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TREATY-MAKING POWER IN THE UNITED STATES*

By The Hon. John W. Davis
United States Ambassador to Great Britain

IT is not easy for a Diplomatic officer, in search of a subject upon which to address a serious-minded body like the Oxford University British-American Club, to select a topic at the same time sufficiently concrete to be of interest, and sufficiently abstract to be within his permitted limits. He must forego, of course, any discussion of matters in train between his Government and the one to which he is accredited; he must be dumb upon all political questions agitating his own countrymen; while as to those which disturb the serenity of his hosts he must, for his life, be not only dumb, but to outward appearance deaf as well. Such restrictions. you will realize, are rather a severe abridgement of the Constitutional right of free speech. They leave their unfortunate subject little secure footing outside the realm of palæontology or the higher mathematics.

I believe, however, that I shall not transgress if I ask you to consider the history and scope of the treaty-making power of the United States, or rather, from the point of view I have in mind, their treaty-making machinery. It is not impossible that some of its manifestations have come to your attention within the last twelve months; and from time to time there has been reason to fear that not all who witnessed its revolutions, or heard the clanking of its parts, have understood the mechanical principles by which it was controlled. Doubtless none of this audience fall within this category; but since you exist, not only to secure but to disseminate information between our countries, I offer no apology for inviting your attention to the particular function of government with which all nations are reciprocally concerned.

There is a peculiar reason for such studies on the part of Britons and Americans. As no two nations are so much alike, so none are exposed to greater danger from a failure to recognize their differences. It is an observation worth some reflections that in all probability neither the War of the Revolution nor the War of 1812 would have occurred if the Americans and English of those days had been less rather than more alike. From the American point of view the Revolution was begun as Englishmen, and continued in defense of rights to which the Colonists in common with other Englishmen were entitled by right of English blood. The searches and seizures that brought on the War of 1812 could never have resulted in the taking of some 2,500 or 3,000 American seamen by British cruisers from the decks of American vessels had it been possible to distinguish them either by speech or by appearance or by habit from those of British allegiance. You said they were British, and if not they ought to be. We said they were Americans and that ought to settle it. So we went to war, spilt each other's blood and wound up without deciding which was in the right, being careful in the Treaty of Peace to avoid all reference to so delicate a subject. The many similarities between the two peoples ought to make, and quite surely do make for their continued friendship; but we must be careful not to put upon these ties a strain stronger than they will bear, and we shall know their strength better if we test them link by link.

It is with such thoughts in mind that I approach the subject I have chosen. As I proceed you will find the American system in many respects not unlike that of Great Britain, but you will also detect many divergencies which I shall not tarry to point out. For, while the foundation as well as the superstructure of the American government was taken in large part from that of England—some by direct inheritance and some by conscious imitation—yet the architects who used these materials gave rein to their individual fancies and convictions and produced a building different in many respects from the ancestral home. The changes time has made in the new structure and the old have not always made them more alike.

Both, for instance, are on the model of government through parliamentary assemblies. But the British Parliament having enacted a law, proceeds in its own person through the Ministry to supervise its execution; our Congress, having given birth to a statute, has nothing to do with its subsequent career, unless indeed it chooses to play the part not of executive, but of executioner. When Parliament has expressed its will, it lies with no court to say that its powers have been exceeded, for Parliament is itself the reservoir of the full power of the State; with us any Act passed by Congress or by the Legislatures of the several States is open to challenge in any court, from the lowest to the highest, upon the ground that it oversteps the limit which the Federal or State Constitution has fixed for the exercise of legislative power. The Royal veto in England has long lapsed into desuetude by lack of use, but no single President of the United States has hesitated to avail himself of his constitutional authority to veto bills with whose form or substance he was not content. Parliament and Congress are each bi-cameral bodies, but it has been made possible for the House of Commons to have its own way, the Lords to the contrary notwithstanding. In America a firm deadlock between the Senate and the House of Representatives can be resolved only by a change of minds or a change of members. And finally, it is the theory of the British Constitution that the treaty-making power is vested in the King, acting through his responsible Ministers; while the framers of the American Constitution committed it to the joint custody of the President and the Senate.

The Constitutional Provision.

The language of the Constitution, Art. III, sec. 2, is that "He—the President—shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

To understand the American Constitution it is necessary to bear in mind the circumstances and the atmosphere which surrounded the Convention by which it was devised. That body met hot on the close of the War of Independence, and its members had all borne in greater or less degree some part in the struggle. To them it had been one of resistance

*An address before the Oxford University British American Club.

Senator Harding's Message to the Association

United States Senate,

WASHINGTON, D. C.

Marion, Ohio,
August 3, 1920.

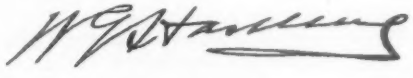
S. S. Gregory, Esq., Editor in Chief
American Bar Journal,

Dear Mr. Gregory:-

I thank you for opening to me the privilege of a little message to the members of the American Bar Association.

I do not need to suggest how greatly the country is at this time dependent upon the services and efforts of the men who make up your great association's membership. We confront problems that demand the cool and understanding attention of the best constructive minds in the Nation. I think we may well doubt, if ever in our history a more difficult conflict of issues was forced upon the attention of the Nation. They reach to every phase of our social, industrial, economic and international relations. The American Bar, always devoted to the great underlying principles of our government and yet never so tied to precedent and form as to be unable to see new things in new lights, must contribute very greatly to the development of those safe and effective measures which will serve the country in this time.

Most sincerely yours,



JW/ME.

to arbitrary and tyrannical authority. They had suffered, as they believed, from a deliberate effort on the part of the Crown to enlarge its power and invade the domain of the elected representatives of the people; and they were determined that, having shaken off their allegiance to George III, they would set up no imitator in his stead. With few exceptions, of whom Alexander Hamilton was the most conspicuous, all were overshadowed by a wholesome fear of unrestrained and ill-defined authority. To speak of a government as "strong" was to condemn it in advance. The political thought of the day, moreover, was under the spell of Montesquieu and his monumental treatise on the Spirit of Laws, and accepted as axiomatic his tripartite classification of the powers of government as Legislative, Executive and Judicial, and his dictum that liberty was safe only when no two of these were lodged in the same hand. The machine which the Convention invented, therefore, was one of checks and balances throughout, allotting to each grand division its appropriate powers, but making the exercise of these conditional upon the concurrence of one or both of the others. Thus, while Congress alone may legislate, the President may veto, and the Courts may test the statute by the constitutional yardstick. The President has great power of appointment to office and great authority as Commander-in-Chief of the Army and Navy; but the Senate must confirm his appointments and Congress alone can raise and maintain, assemble or dismiss, the forces which he is to command. The Judges of the Federal Courts hold office during good behavior, and are independent and untrammelled in the discharge of their judicial duties; but the Senate must confirm them upon appointment, and Congress must pre-

Governor Cox Also Extends a Greeting

State of Ohio
Executive Department
Columbus

August 6, 1920

Mr. S. S. Gregory,
Editor in Chief, American Bar Journal,

My dear Mr. Gregory:

I very much appreciate your courtesy, and the opportunity offered me to extend a greeting to the American Bar Association.

We are in a critical time in the life of our country. I have an abiding faith that the difficulties which beset us will be overcome, and the problems which face us will be solved to the everlasting credit of the republic.

I happen to be one of those who believe that the republic makers builded under the guidance of a Divine hand; that the things which moved to the formation of the United States of America as the haven for the oppressed and the downtrodden, giving to them a new hope and a new life, are present today, and that America still holds the torchlight of advancement for the world.

This is a time for straight thinking, straight speaking, and straight acting. The great heart of America, which caused us to enter into world conflict in behalf of human rights, still throbs with life; and the conscience of this people still functions. I cannot believe that there is even possibility that we will forget the noble impulse which inspired us and enter into repudiation of the motives which spurred us on to action.

We are now at the beginning of a political campaign in which the thought of America will be expressed. I am thrilled at the belief that we are all moved by the impulse for good. We may differ as to means; the end we seek is the same and that end is the unbroken advance, spiritual and material, of our glorious country.

Very truly yours,

James M. Cox.

scribe their numbers, and the organization and jurisdiction of the Courts over which they are to preside. Indeed, I think at the moment of but one power given without some corresponding check—the power of executive clemency; although even here the President would be answerable before the Senate by impeachment for its corrupt use and to the people at the ballot box for its unwise exercise.

Few governmental agencies are invented outright. Their roots are commonly in the past. It will help therefore to recall the three distinct stages through which the revolting colonies passed on their way from individual independence to Federal Union.

The first of these was the era of the Continental Congress, first assembled in 1774, composed of del-

egates from the several colonies, whose duty it was to concert measures for the common defense. It was this body which afterwards declared war, adopted the Declaration of Independence and gave birth to the Articles of Confederation. It was a gathering of plenipotentiaries from independent units, bound together by no written compact. Nevertheless, it found it expedient to contract with foreign powers. Commissioners were appointed to negotiate with various European nations, but the treaties which they reported were made for and on behalf of the thirteen States by name, and the Congress shared with no other officer the power to direct the negotiations and ratify the result.

The second was the period of the Confederation, beginning with the adoption of the Articles of Confederation, framed in 1777, finally ratified by all the States in 1781, and lasting until the inauguration of the new Government under the Constitution in 1789. In entering the Confederation the States were careful to reserve their "sovereignty, freedom and independence, and every power, jurisdiction and right which is not by the Confederation expressly delegated to the United States in Congress Assembled." The sole and exclusive right and power of entering into treaties and alliances was vested in the "United States in Congress assembled," upon condition that nine[1] of the thirteen States voting as units in the Congress should assent to the same. So determined was the Congress to keep in its own hand the trust thus committed to it, that the appointment of a Secretary of the United States for the Department of Foreign Affairs in 1782 was accompanied by a resolution requiring all instructions to Ministers of the United States, all letters to Ministers of Foreign Powers in relation to treaties, all letters of credence and the plans of the treaties themselves to submitted to Congress for its inspection and approbation This was certainly clumsy machinery, yet it sufficed to bring about in 1783 the treaty with Great Britain which recognized American independence and established the new nation.

The third era is of course that of the "more perfect Union" under the Constitution, which began with the inauguration of President Washington in 1789. When the Constitutional Convention met in 1787 the mind of the delegates was accustomed to Congressional control and State approval of treaties and treaty-making, and therefore it is not surprising that the first draft reported to the Convention by its Committee on Detail vested the power to make treaties and appoint Ambassadors in the Senate alone, choosing that body because it was the representative of the States as was the lower House of the people. After discussion of this proposal, which was criticized as lacking in those elements of secrecy, dispatch and prompt decision so necessary in delicate negotiation, a later report recommended the transfer of the power to the President, acting by and with the advice and consent of the Senate, or of two-thirds of the members present. This provision, although finally adopted, was not permitted to escape without challenge. Some thought the power should lie with the President alone, others that it should remain solely with the Senate. Some thought the requirement of a two-thirds majority objectionable, since a minority might be able to block a treaty of peace and thus prolong a war which a majority were anxious to conclude. Others fancied that the danger lay rather with the President, who, if the Senate were not left in sole control, might block the conclusion of such a treaty in order to prolong the great accession of power and influence coming to him in consequence of a state of war. Gouverneur Morris urged that the concurrence of the President and a bare majority of the Senate should settle the question of peace; while Elbridge Gerry contended that treaties of peace dispose ordinarily of such vital matters that they of all others should be guarded by the two-thirds requirement. Numerous amendments, presenting these and other points of view, were voted down, and the clause was permitted to stand as we have it today. As Charles Cotesworth Pinckney of South Carolina put it in the debates that followed when the work of the Convention was before the several States for their approval:

> At last it was agreed to give the President a power of proposing treaties as he was the ostensible head of the Union, and to vest the Senate (where each State had an equal voice) with the power of agreeing or disagreeing with the terms proposed.

Or in the language of Thomas Jefferson in his Manual of Parliamentary Practice, adopted by the Senate as the basis of its rules of order:

> By the Constitution of the United States this department of legislation is confined to two branches only of the ordinary Legislature; the President originating and the Senate having a negative.

Perhaps this brief summary puts the case as well as would a longer exposition. It answers, at least, to the point where the work of the Senate is concluded; for I would have you understand that in the formation of a treaty, valid and binding upon the United States, there are three distinct and indispensable stages. These are, first, negotiation by the President; second, approval by the Senate; and third—and this is by no means a mere form—ratification by the President. Let us consider these in order:

Negotiation by the President.

"The President," said John Marshall, "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[2] As such, his discretion in the matter of negotiation is absolute, and uncontrolled. The time, the manner, the subject of the negotiation, are all for him and him alone. He may begin at his pleasure and leave off at his will. He may conduct the negotiation through the usual diplomatic channels or by means of special agents of his own choosing; and of course, what he might do through his agents he may do in his own proper person. He may bring forward any project which meets with his approval, and he may decline to enter upon any topic which his judgment rejects. In the former event his work must ultimately be passed upon by the Senate, but in the latter the Senate is powerless to stir him to action.

In the nature of things this must be so, for it needs no argument to show how impossible it would be for a body to negotiate in any real sense which was composed at its formation of twenty-six members and has grown with the passage of time to ninety-six. It would be mutually insupportable, moreover, if foreign powers were compelled to weigh the credentials of the head of the State. As early as 1793 Mr. Jefferson, writing to the French Minister by authority of President Washington, stated that as the President was the only channel of communication between the United States and

1. That is to say, two-thirds.

2. *Annals* 6th Cong. 613.

foreign nations, it was from him alone "that foreign nations or their agents are to learn what is or has been the will of the nation"; that whatever he communicated as such, they had a right and were bound to consider "as the expression of the nation"; and that no foreign agent could be "allowed to question it or to interpose between him and any other branch of the government under the pretext of either's transgressing their functions."[3]

Of course, he has the right to ask the advice of the Senate at any stage of the proceeding, and the Senate in turn may express its views by an appropriate resolution whenever the spirit moves it. But no duty to make such an approach rests upon the President, and he may give to any expression from the Senate only the weight which pleases him. Long continued custom has practically dispensed with any consultation of a formal character between them in advance.

In the beginning President Washington thought it the better plan to meet with the Senate in person before negotiations were begun. He presented himself accordingly to take their advice touching a proposed treaty with the Southern Indians, propounding a series of questions for their consideration. Discussion broke out, the session was adjourned to the succeeding day, and finally the Father of His Country departed with what one chronicler describes as a "discontented air," adding, "Had it been any other than the man whom I wish to regard as the first character in the world, I would have said with sullen dignity."[4] Another, with perhaps even closer approach to the facts, reports him as saying when he left the Chamber that he would be d——d if he ever went there again.[5] He kept his word, and although the rules of the Senate still make provision for the decorous procedure to be observed on such occasions, Senator Lodge remarked on the floor of the Senate on January 24, 1906, "Yet I think we should be disposed to resent it if a request of that sort was to be made to us by the President."[6] The precedent thus set remained unbroken for 128 years, or until President Wilson appeared before the Senate on January 23, 1917, to address them upon the essential terms of peace, chief among these being the formation of a league of free nations to guarantee peace and freedom throughout the world.

Notwithstanding this unpleasant experience, President Washington continued throughout his term to invoke the opinion of the Senate by written messages upon negotiations which he proposed to inaugurate; but with his disappearance from office the custom fell into disuse and has practically disappeared.[7] Instances have continued to occur, but they have been relatively few in number and unimportant in result.[8] As early as October 15, 1804, Mr. Madison, afterwards President, then Secretary of State, wrote to Minister Yrujo of Spain contrasting the Spanish and American practice, in this language:

> Another distinction absolutely decisive is that the conditional ratification . . . proceeded from the Senate, who sharing in treaties on the final ratification only, and not till then even knowing the instructions pursued in them, cannot be bound by the negotiation like a sovereign, who holds the entire authority in his own hands.

And he goes on to add:

> When peculiarities of this sort in the structure of a government are sufficiently known to other governments, they have no right to take exception at the inevitable effect of them.[9]

Henry Clay, when Secretary of State in 1825, expressed the same point of view, thus:

> According to the practice of this Government, the Senate is not ordinarily consulted in the initiatory state of a negotiation, but its consent and advice are only invoked after a treaty is concluded under the direction of the President and submitted to its consideration. Each of the two branches of the treaty-making power is independent of the other, whilst both are responsible to the states and to the people, the common sources of their respective powers.[10]

President Jackson, in asking the Senate on May 6, 1830, for its advice upon a proposed treaty with the Choctaw Indians, takes occasion to declare himself

> fully aware that in this resorting to the early practice of this Government by asking the previous advice of the Senate in the discharge of this portion of my duties, I am departing from a long and for many years unbroken usage in similar cases. But (he adds) being satisfied that this resort is consistent with the provisions of the Constitution, that it is strongly recommended in this instance by consderations of expediency, and that the reasons which have led to the observance of a different practice, though very cogent in negotiations with foreign nations, do not apply with equal force to those made with the Indian tribes, I flatter myself that it will not meet with the disapprobation of the Senate.

It has been suggested, however, that the Senate might be related to the negotiations leading to a treaty by the appointment of one or more of its members as plenipotentiaries for that purpose. But here again both precedent and, as many think, the better reason, bar the way. Among the Commissioners whom President Madison selected for the Conference at Ghent which closed our war of 1812, were James A. Bayard of Delaware, a distinguished member of the Senate, and Henry Clay of Kentucky, then Speaker of the House. They were impressed, however, with the fact that such a service would impose upon them a double duty; to their colleagues at the conference to respect any confidences that might there be confided to them, and to their associates in Congress to disclose all matters within their knowledge. Accordingly, both resigned from Congress before entering upon their duties as Commissioners. At the end of the Spanish-American war President McKinley sent to the peace conference at Paris a commission of five members, three of whom, Messrs. Davis, Frye and Gray, were eminent members of the Senate. But the practice was so little to the liking of the Senate that a resolution disapproving it was introduced and referred in regular course to the standing Committee of the Judiciary. The Committee declined to report lest its action might be taken as a personal reflection upon the gentlemen selected. Instead, it sent its chairman, Senator Hoar of Massachusetts, to remonstrate with the President and to say to him "that the committee hoped the practice would not be continued." Senator Hoar, in a description of the interview, reports the President as saying "that he was aware of the objections; that he had come to feel them very strongly; and while he did

3. IV, Moore's *Dig.* sec. 670.
4. Maclay's *Sketches of Debates in the First Senate of the United States*, 122-126.
5. 6 *Memoirs*. J. Q. Adams 427.
6. *Cong. Rec.*, 59th Cong. 1st sess., 1470.
7. *Butler on Treaty-Making Power of U. S.*, sec. 462.
8. The most conspicuous of these is perhaps the action of President Polk in reference to the Oregon boundary settlement in 1846. He remarked in his message that "This practice, though rarely resorted to in later times, was in my judgment eminently wise, and may, on occasions of great importance, be properly revived."
9. II, *Am. State Papers, For. Relations*, 625.
10. V, Moore's *Digest*, 200.

not say in terms that he would not make another appointment of the same kind, he conveyed to me, and I am sure meant to convey to me, an assurance that it would not occur again."[11]

Among the objections urged at the time were that such appointments tended to give to the President an undue influence over the Senate, and violated in spirit if not in letter the clause of the Constitution forbidding any Senator or Representative during the time for which he was elected to be appointed to any civil office under the United States, which should have been created during such time.

It is worth noting also that when this particular treaty of peace was laid before the Senate it gave rise, notwithstanding the make-up of the Commission, to the most heated and acrimonious debate, and for a time its ratification was seriously in doubt.

It narrowly escaped the fulfillment of a gloomy prediction made by John Hay in the month of May, 1898, when he wrote to a friend:

> I have told you many times that I did not believe another important treaty would ever pass the Senate. . . . The man who makes the treaty of peace with Spain will be lucky if he escapes lynching.[12]

The Approval of the Senate

But free and unfettered as is the President at every stage of the negotiations, the Senate is no less so when the result of his efforts is laid before it. It then becomes not only the right but the duty of all Senators to give expression to their impartial and independent judgment; and save for moral suasion the President is as powerless to influence their conduct as were they to dictate his own. Moreover, party ties cannot be relied upon to produce favorable action, for occasions are rare when any political party commands two-thirds of the seats in the Senate or a like proportion of those present and voting.

Without entering upon the intricacies of parliamentary procedure, it must be admitted that the path of a treaty through the Senate is not always strewn with roses. The treatment meted out has taken many different forms. The Senate has at various times (1) approved unconditionally, (2) approved with amendments, (3) approved without express amendments but upon condition that certain changes should be made, (4) approved with an accompanying resolution of reservation or interpretation, (5) failed or refused to act and so permitted the treaty to die an *un*natural death, or (6) disapproved and rejected.

The right to amend, or to approve upon condition that amendments should be made, was exercised from the outset. When the Commercial Treaty with Great Britain, negotiated on behalf of America by John Jay, first Chief Justice of the United States, was laid before the Senate in 1795, the 12th Article, by a rather inexcusable oversight on Jay's part, was so drawn that it prohibited the transportation of American cotton in American vessels; it failed, moreover, to open the trade with the British West Indies to the extent which had been hoped. The Senate accordingly revised and consented to the ratification of the treaty "on condition" that an article should be added suspending so much of the objectionable article as related to trade between the United States and Great Britain. This was assented to by the British Government and ratification ensued. Since that time the practice has been followed with no little freedom, one author having computed that seventy treaties so amended had come into operation between the birth of the Union and the year 1906,[13] and the number has been added to since that day. Indeed, it is not at all uncommon for the President in transmitting the treaty to the Senate to suggest certain amendments which further consideration upon his part has led him to advise.[14]

Of course, such amendments are of no effect until they have received the consent of the other party to the covenant, and in this sense the Senate may be said to negotiate. But they are not considered to require a reopening of the formal negotiations nor a resigning of the treaty, since the final exchange of ratifications of the treaty so amended is sufficient evidence of mutual consent.

Reservations and interpretative resolutions are likewise by no means infrequent. Thus, in advising and consenting to the ratification of the General Act of the Algeciras Conference, the Senate took occasion to assert that in so doing it had no intention to depart from the traditional policy of America to have nothing to do with "the settlement of questions which are entirely European in their scope." While in acceding to the Hague Convention of 1907, it felt called upon to declare that nothing contained in that Convention should be so construed "as to require the United States of America to depart from its traditional policy of not intruding upon, or interfering with, or entangling itself in the political questions or policy or internal adminstration of any foreign state; nor shall anything contained in said Convention be construed to imply a relinquishment by the United States of America of its traditional attitude towards purely American questions."

How often, however, is the logic of events wiser and more inexorable than all the reasoning of statesmen. The pages of history are full of time's revenges, and even Senatorial wisdom has not escaped them. For instance, to mention but a few of many examples, in the year 1844 the Senate, moved largely by political feeling growing out of the slavery question, defeated a treaty for the annexation of Texas, which had seceded from Mexico and declared itself an independent republic; but before two years had rolled around Texas became a State of the Union. In 1854 it rejected a like treaty for the annexation of Hawaii, but this, too, came to pass after the lapse of forty-four years. In 1865 it took similar action upon an agreement to purchase from Denmark the Virgin Islands for seven million five hundred thousand dollars; but the only result was to delay their acquisition for more than half a century and treble the price to be paid. In 1888 a treaty to settle the century-old dispute with Canada over the Atlantic Fisheries failed of approval, but wise counsels prevailed twenty years later and the matter is now at rest.

Be the action of the Senate what it may, it must not be imagined that any discourtesy is implied toward the Government with which the treaty is negotiated. As Secretary Fish put it in communicating with Great Britain when the treaty of 1869 dealing with the Alabama claims had been rejected:

> The United States can enter into no treaty without the advice and consent of the Senate; and that advice and consent to be intelligent must be discriminating; their

11. *Cong. Rec.*, Vol. 30, Part 3. p. 2695.
12. II. Thayer's *Life of Hay*, 170.
13. Foster's *Practice of Diplomacy*, 276.
14. *Crandall on Treaties*, sec. 52.

refusal can be subject to no complaint, and can give no occasion for dissatisfaction or criticism.

Ratification by the President.

If the treaty has survived its ordeal in the Senate there remain the final steps of ratification by the President, the exchange of ratifications with the contracting power, and the President's proclamation declaring it the law of the land. Here there returns to the President all the freedom which he originally enjoyed. He could have declined in the first instance to negotiate; he could have elected not to lay the negotiated treaty before the Senate; he could at any time before the final vote have withdrawn it from their further consideration; and now he may decide to proceed no further upon the advice and consent which the Senate has expressed. This is true as well when the action of the Senate is one of unanimous approval, as when it is one of grudging consent or mutilating amendment.[15] In either case he may lock the treaty in his desk or consign it to cold oblivion in the public archives.

The roster of such diplomatic casualties is by no means short. It displays the constant jealousy with which the executive and the Senate have guarded their respective powers. There was tremendous mortality, for instance, when the Senate and President Roosevelt locked horns over the arbitration treaties negotiated by Secretary Hay with a number of nations. These provided for the reference to The Hague Court of all difficulties of a legal nature as well as those relating to the interpretation of treaties, which could not be settled by diplomacy, and which did not affect vital interests, independence or honor. The reference in each case presumably by the direction of the President. This was to be made by special protocol or agreement, the Senate amended so as to keep the matter in its own hands. President Roosevelt was so deeply incensed that he refused to go on with the treaties. We hear from Hay again after this experience with the remark that:

> A treaty entering the Senate is like a bull going into the arena: no one can say just how or when the final blow will fall—but one thing is certain, it will never leave the arena alive.[16]

The Constitution Supreme.

I have spoken of the untrammelled discretion of the President and the Senate, but the phrase is really a misnomer. In the words used by Herodotus to describe the freemen of Greece, "though free, they are not absolutely free, for they have a master over them, the law." Like all other officers of the Government they dare not exceed the authority which has been granted to them, and a treaty no less than a statute must conform to the Constitution and yield to its superior force. No treaty, by way of illustration, would have binding force which violated the Constitutional prohibition against the establishment of religion or the restriction of its free exercise, which abridged the right of the people peaceably to assemble and to petition for a redress of grievances, which sought to re-establish chattel slavery, or which disturbed the Constitutional distribution of power.

In matters requiring the appropriation of money or affecting customs dues and tariffs, the consent of the House of Representatives must also be obtained before the treaty can be executed; for like the House of Commons, it holds the purse, with the right to unite in all appropriations and to initiate all legislation for raising the revenues, and it is zealous in the defense of its prerogatives.

Whether the Federal Government can agree to the cession of territory without the consent of the State of which it forms a part, is a question that has caused no little academic discussion. When the northeastern boundary between the State of Maine and Canada came to be settled the precaution was taken to have the State represented in the negotiations by commissioners and to secure the consent of its Legislature. But if the time should come—which, in the pious language of the old treaties, "is not to be expected and may God forbid"—when the territory of the United States is successfully invaded, there will be a pretty controversy as to the right of the Federal Government to ransom the rest of the Union by ceding all or any part of the invaded portion.

Of more practical consequence is the query whether by the use of the treaty-making power the Federal Government can deal with any of those matters left by the Constitution to the control of the States; matters of public morals, public health, the hours of labor, or, as in the case of our most recent treaty with Great Britain, the protection of the wild fowl that come and go across the Canadian border. Here there is a fierce battle among the pundits. You will think it strange that after the Constitution of the United States has been in force for 140 years such questions should still be open. I can only reply that there are many more equally unsettled, and as to all of them we wait for a deliverance in the fullness of time from the Supreme Court as the final arbiter and interpreter.

Conclusion.

Such in meagre outline is the treaty-making power of the United States, and the machinery by which it operates. An unfriendly critic might denounce it as complicated and cumbersome, ill-adapted to the complex demands of international intercourse, slow in action and uncertain in outcome. The requirement of a two-thirds rather than a majority vote in the Senate he might criticise not unjustly as a dubious excess of caution. He might point his moral and adorn his tale with many instances of sharp and frequently bitter discord between Presidents and Senators. Of this audience, however, I ask only that if you think it like Rob Roy MacGregor, "ower bad for blessing," you pronounce it also "ower good for banning." For, believe me, the American people are like for many years to accomplish through this means their compacts with mankind. The checks and balances by which it is surrounded, the free and full debate which it allows, are in their eyes virtues rather than defects. They rejoice in the fact that all engagements which affect their detinies must be spread upon the public records, and that there is not, and there can never be, a secret treaty binding them either in law or in morals. Looking back upon a diplomatic history which is not without its chapters of success, they feel that on the whole the scheme the fathers builded has served the children well. With a conservatism in matters of government as great perhaps as that of any people in the world, they will suffer much inconvenience and run the risk of occasional misunderstanding before they make a change.

15. *Crandall on Treaties*, par. 53.
16. II, Thayer's *Life of Hay*, 393.

SINN FEIN COURTS IN OPERATION

By W. H. Brayden*
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IT has long been a familiar charge against Irish political movements that their agents, while masters of the art of destructive criticism, have never been able to construct anything. There are many possible argumentative answers to the charge. But it has been left to the Sinn Feiners to refute it most strikingly in practice. They have, while under the ban of the law, and exposed to its punishments, been able to construct from bottom to top a whole system of effective courts of Justice. They are daily emptying the Kings Courts and filling their own. The Irish Bar looks on, part of it with consternation and part of it with secret sympathy, while the law business, in a litigious country, abandons the long established tribunals, to be discharged by makeshift courts, set up by an illegal organization enforcing its decrees through universal intimidation.

Every system of law depends, of course, in the last resort on intimidation. The man who defies the decision of a constituted court in any country is made to feel, in one form or another, the sword behind the sceptre. The enemies of Sinn Fein describe its form of intimidation as the bullet behind the hedge. It is perhaps, the most significant evidence that can be given ot the state of affairs in Ireland to point out the admitted fact that, while Sinn Fein receives from its followers a more ardent devotion than the regular government in Ireland has ever received from anybody, it can inspire in those who disobey it a more immediate dread of the consequences than can the power of all the King's horses and all the King's men. It is feared as much as it is loved.

There is a story told of a conversation between that eminent jurist Lord Brampton and a Bishop. The Bishop claimed a greater power than the judge. "You," said he, "can only say to a man 'you be hanged.' I can say 'you be damned.'" "Yes," replied Lord Brampton, "but when I say to a man 'you be hanged,' he *is* hanged." Sinn Fein's results can be predicted with all the judge's confidence. The government's results, are, like the bishop's in the story, problematical. When the Chancery Division of His Majesty's High Court of Justice in Ireland declares that a piece of land is rightly vested in a certain individual, and that he is entitled to quiet possession, he has won his case; but his consolation generally ends there. In fact he is no better off. When a Sinn Fein Court gives a similar decision, it can "deliver the goods." Quiet possession is a certainty. Not a dog dare bark.

It is in relation to disputes about land that the Sinn Fein courts have scored their greatest success. They were born out of the most serious danger that has so far threatened the Sinn Fein political movement. Land hunger is chronic in Ireland. Sinn Fein numbers in its ranks not only a proletariat of landless men; but many men of substance who occupy tracts of land on which the landless men cast greedy eyes. I have known men who subscribed handsomely to the Republican Loan to be attacked as fiercely as ever were the landlords and landgrabbers in the days of the Land War. Their cattle were rounded up and driven off their lands. Their herds were threatened. Appeal to the Kings Courts, would, in the circumstances of the prevailing political sentiment, be distasteful to many of them. In any case it would be quite ineffective. Soldiers and police might be sent to protect them; but the protection would be rather an embarrassment than a help. Sinn Fein by its policy of violent revolt had disabled the usual forces of law; and the alternative seemed to be sheer anarchy. Sinn Fein, it was confidently forecasted, would be torn in two in the internal conflict between its "Haves" and its "Have nots."

The Sinn Fein leaders, however, rose to the occasion. They had been, a good many wise people thought, merely playboys of the Western World, playing at Government, with their Cloud-Cuckoo-Land Republic "in being," their travelling President, their imaginary Ministers of State, their Secretaries for the Interior, and for Foreign Affairs, their elaborate debates in the Irish Language, a whole machinery which seemed to end in nothing and to be but one more example of the national delight in "passing resolutions." But the speed and the efficiency with which they organized and worked their Land Courts have largely discounted this cynical criticism.

According to law they have no business to exist at all. They are, on paper, all suppressed. By Statute, and by Viceregal proclamation, every meeting they hold in pursuance of their organization is a criminal offense. Everybody present at it, every newspaper editor who reports it, is liable to prosecution. Such is the effect of the Criminal Law Amendment Act of 1887 and of the proclamation issued last year under its provisions by Lord French, the Lord Lieutenant. In addition, under the War Statute, the Defense of the Realm Act, they are all liable to deportation and detention without charge or trial; and some of their oldest and most experienced heads, the men most familiar with the handling of public affairs, like Alderman Thomas Kelly M. P. Lord Mayor Elect of Dublin, and Alderman Cosgrave M. P. have been put in jail, let out again, and put in again in accordance with the constantly varying policies of the transient and embarrassed occupants of Dublin Castle.

Notwithstanding all this uncertainty and danger, the Sinn Feiners have been able to organize their courts, equip them with judges, attract the confidence of litigants, and secure obedience to their decrees. In hardly more than three months since their first sittings we have seen the regular Irish County Courts practically deserted, and the cases already heard by them and awaiting appeal to His Majesty's Judges of Assize withdrawn from the record.

It is freely admitted on all sides that the main

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reason for this success is the public confidence in the competence and justice of the new courts and in the power behind them. If the litigants and the advocates were all members of the Sinn Fein party, the result, however creditable, would be in no way surprising. It would amount to hardly more than the settlement of domestic differences by Arbitration. But the Sinn Fein Land Courts have had a far wider range. They have had before them political enemies as well as political supporters, and both have professed themselves satisfied with their experience. Unionists and landlords, surrounded by conditions of chaos, while squadrons of cavalry were collecting their scattered cattle, regarded the Sinn Fein courts as a sort of pis-aller. There was no use in appealing to the regular tribunals; they could be no worse off, and they might be much better, if they tried Sinn Fein.

FARM LABORER AS SINN FEIN JUDGE

Thomas Hand, a county Dublin farm employe, aided by his wife, is "dispensing justice." His jurisdiction is wide and his "republican" judgments and declarations are recognized as effective.

—Photo by courtesy of the Chicago Tribune Foreign News Service

This point of view was well expressed in the principal Irish Unionist newspaper by an old-fashioned family solicitor, anxious to do what was best in his client's interests. His client, he said, was a widow, solely dependent for her income on the profits of an estate in Connaught. Hostile claims were made to the estate. He was confident in the justice of his client's position. He argued that any honest tribunal of average intelligence would not fail to establish her right. He believed that the judge in Chancery would decide in her favor; and so, he was sure, would the Sinn Fein judge. Which tribunal was it better to try? Fortified with the decree of the Chancery Judge, he could invoke all the armed forces of the Crown. He could ask for, and very possibly might get, as many police and soldiers as the Commander-in Chief could spare. They might, if they were lucky and sufficiently alert, hold the place against all comers. The lady might, in fact, have at Imperial expense, a guerilla war on her own account. Once the Sinn Fein Court, however, decided in her favor her estate was sacred; and she might live at peace. He chose the Sinn Fein Court.

After a short time the activities of the Sinn Fein Courts extended from land disputes to every sort of litigation. It became a point of honor to patronize them and stay away from the Kings Courts. Newspaper correspondents have occasionally as a great favor been admitted to the courts, and have treated their experience as a sort of wild adventure. But a cold observer might fairly describe the proceedings as dull. The sole consideration seems to be to conduct the business in hand promptly, effectively, and with general approval.

There are no barren spectators to be played to, and there is a marked absence of the judicial humorist. There is nothing of what is usually called forensic. The practice of the Courts, while free from technicalities, is formal and careful, and is aimed rather at reconciling adversaries than at affording them the opportunity for future legal conflict.

There used to be a cynical saying in the hall of the Dublin Four Courts, in the days before the operation of the Judicature Acts, when there really were four courts: If you have got the law of the case on your side, but not the merits, try the Court of Exchequer. If you have the merits, but not the law, try the Court of Common Pleas. If you have neither the law nor the merits, try the Queen's Bench. The Sinn Fein Courts have emulated the old Common Pleas. They have tried to focus on the merits. They have, according to all accounts (derived in many cases from men very hostile to Sinn Fein principles, and purposes), endeavored to do impartial justice; and have surprised hardened Unionist Practitioners by their willingness to decide in favor of an unpopular landlord against a popular tenant, when the facts called for such a decision. Rights of way, a familiar source of sometimes life-long feuds between neighbors, have been arbitrated upon and promptly settled. Cases of seduction, judicial separation of the unofficially married, and of assault have been tried. The thorny ground of libel and slander actions has been traversed with success. A Cork farmer, for example, had brought an action for slander against a priest, and feeling over it was very bitter. The case was first entered in the Kings Courts and went through all the stages of pleading, and trial before a High Court judge. The result was, as is frequent in this class of action, a disagreement of the jury. That meant another expensive trial. The case, however, was withdrawn and submitted to a Sinn Fein court, which promptly heard it. It decided against the priest, and awarded the farmer the nominal damages required to vindicate his character (he had suffered no real injury), and ordered the priest to apologize. The apology was forthcoming, and the parties are now friends.

All this, important and significant as it is, can, however, hardly be described as revolutionary. It is quite possible that it might be reproduced in any country where a community, irritated by the law's delay and uncertainty, thought proper to make the experiment of arbitrating its differences in an informal way. The operations of the Sinn Fein criminal courts are a much more serious proposition. The Sinn Feiners arrest men for every sort of criminal offense, try them in their necessarily strictly secret courts, and fine, imprison or deport them as they please. Every day cases of burglary, larceny, assault, illicit distilling, damage to property, are disposed of. There is an average proportion of acquittals, as in any regular court. The sentences vary from banishment for ten years, down to short imprisonments and fines. Some of the punishments are mediaeval in their naiveté. Two men found guilty of robbing an old woman when the money was returned were sentenced to be publicly paraded after Mass on the following Sunday. One noteworthy feature of the prosecutions for theft is their success in recovering the stolen property.

Naturally the Government which, for the sake of agrarian peace, might possibly be content to turn a blind eye to the satisfactory adjustment, even by an illegal tribunal, of disputes about land, cannot afford to lose its essential monopoly of saying who is or is not a criminal. Only a Government with the right to govern ought to determine such a matter. In Ireland, the question which government has the right to govern, is the whole point in dispute. In the eye of the law every member of the Sinn Fein organization is, by proclamation, ipso facto an illegal person, liable to imprisonment; and every thief, or alleged thief, that Sinn Fein punishes is the victim of a criminal conspiracy, and entitled to the protection of the police as the only thus find today in many an Irish district Sinn Feiners, on the hunt for burglar; the police on the hunt for the Sinn Feiners, and bringing up the procession, sometimes with deadly results, a further contingent of Sinn Feiners on the hunt for the police. In most cases, however, the offenders rounded up by Sinn Fein prefer to take their punishment quietly instead of inviting the protection of the police, and the natural inference is that there are good reasons for their decision. One amusing case occurred in which a man charged with theft said he refused to acknowledge the jurisdiction of the Sinn Fein Court, and was politely informed that if he would name any other court whose jurisdiction he did acknowledge the Sinn Feiners would be glad to hand him over to it.

Judgment on all this amazing state of affairs depends upon the point of view. On the one hand the country is described as seething in anarchy, and over the verge of Bolshevism. On the other hand, we find such a moderate and responsible Irishman as Sir Horace Plunkett declaring in "The Times" that "Order is preserved with increasing success by Sinn Fein"; and Lord Monteagle endorsing Sir Horace Plunkett's view.

The Sinn Fein Courts, organized under "the Department of Justice of Dail Eireann," are threefold. There are Parish Courts, with jurisdiction in cases not exceeding ten pounds in value; and with no power to decide any question of title. These correspond to the existing Petty Sessions Court. Above these are the District Courts, corresponding to the existing County Courts, which have a much wider jurisdiction, and over all is a Court of Appeal. There is an appeal within four days from the parish to the District Court, and from the District Court to appeal judges appointed by the Republican Minister of Justice. It is intended that the judges of the Parish Courts, three in each district, should be elected by the votes of the people in whose area they operate—a startling novelty on this side of the Atlantic. Pending the erection of suitable machinery of election, the judges are selected by a conference composed of representatives of various local elective bodies, of the Irish Volunteers, of the Sinn Fein organization and of the clergymen of all denominations. The parish judges get not more than one pound, and the district judges not more than two pounds a day for expenses. There is a regular scale of court fees to meet the expenses, amounting to ten per cent of the value of the property in claims not over fifty pounds and an "increasingly small" (so they put it) percentage as the value in dispute is greater. All litigants have got to sign a public undertaking that they will comply with the decision of the court and not submit "to any enemy tribunal."

The frequent appearance of solicitors (who are

technically officers of His Majesty's High Court of Justice) and the possible appearance of barristers, before these illegal and rival tribunals, has engaged the attention of the heads of the legal profession. When indignant Unionists in the House of Commons complained of the countenance given to law breakers by men following the honorable profession of the law they were informed by the Attorney General for Ireland that the Government had no control over the legal profession which was ruled, as regards the solicitors, by the Incorporated Law Society of Ireland; and as regards the barristers by the Benchers of the Kings Inns. The Incorporated Law Society, if dissatisfied with the conduct of a solicitor, can appeal to the Lord Chancellor to strike him off the rolls. The Benchers can disbar any barrister for misconduct. The Incorporated Law Society summoned before it some of the solicitors who had consented, in the interest of their clients, to attorn to Sinn Fein by appearing in its courts. The impeached solicitors were able to point out the similarity between the proceedings they had attended, and the arbitrations which are an everyday feature of legal business everywhere. As for the dissimilarities—if they were illegal, why did the Government not prosecute them?

So far, the Incorporated Law Society has left it to the Government to bell the cat. No solicitor has been punished. No barrister has, as far as is known, openly appeared as yet before a Sinn Fein Court. They are suffering severely in pocket. An eminent Kings Counsel, for instance, told me that at the last Assizes in one small town he had earned two hundred guineas in fees. To the Assizes now being held he did not go at all, because the fees available would not exceed ten guineas and would not be sufficient to pay his travelling expenses. The hardship is more serious in the case of the young men accustomed to deal with County Court business, and with appeals from it. Their incomes are disappearing rapidly. As yet they have not attended the Sinn Fein Courts; some of them from hostility to Sinn Fein, and some of them from a fear of being disbarred. The Bar Council, which is elected by the Bar, with some ex-officio members, has passed a resolution that to accept a brief in a Sinn Fein court would be professional misconduct; and the Benchers of the Kings Inn have the power, if they choose to exercise it, of disbarring and so disqualifying from all legal business, anybody guilty of professional misconduct. The few cases of disbarring which I remember were of men convicted of offenses in a court of law; and it is not at all certain that disbarring would follow mere appearance before a Sinn Fein Court, especially as nearly half the practicing barristers disagree with the Bar Council. But the risk is there, and so far no barristers have faced it.

AN IRISH LAWYER'S PROTEST

A dispatch from Dublin to the London Times, dated June 27, states that the Irish Bar Council has considered the problem raised by "the steady encroachment of Sinn Fein courts on the constituted domain of law," and has declared by resolution that it is professional misconduct on the part of any member of the bar to appear before the Sinn Fein courts.

The action of the Irish Bar Council is warmly supported by Mr. A. M. Sullivan, a distinguished member of the Irish bar, in the following letter, printed in the London Times of July 10:

"Sir—The unanimous resolution of the Council of the Bar of Ireland that no member of their profession may appear before such tribunals as are constituted under such "submissions" as were produced to the Council, has occasioned great excitement in the columns of the journals that encourage disorder in Ireland, and has been the subject of adverse comment by some reputable papers. The resolution of the Bar Council was unanimous; to understand it, however, a little thought is necessary.

"Ireland has for many years enjoyed a system of jurisprudence that has been developed by the wisest lovers of freedom that have graced three centuries. It has two great defects, but the lie that the adminstration of the law in Ireland is "British" is an insult to the Irish people. In our Courts, Irish law is administered by Irishmen as the defence of Irish rights. The English Government taints the system by constant embezzlement of judicial offices to provide pensions for politicians. There have been, however, only two instances in which the promoted politicians have not honorably endeavored to forget their prejudices on their accession to the Bench, but the injury to public confidence has been irreparable. The functions of the judge are not of more importance than the functions of the advocate. Not only have the greatest judges been molded at the Bar, but upon the Bench they have been molded by the Bar, and there is no wiser feature of jurisprudence than that which maintains as an essential factor a body of officers trained to assist in the administration of justice by bringing before the tribunal every aspect of a case in order that right may be done. Such advocates can be of public service only in the Courts which act according to the principles of public law in which all are trained. No counsel will soil himself by lending the sanction of his participation to the performances of a body which repudiates and denounces those principles of justice which constitute his creed. The slaves who are bullied into submitting to the Sinn Fein "Courts" are obliged to subscribe to the lie that the Irish Courts, of which every member of the Bar is an officer, are enemy organizations for the oppression of Ireland. No man, unless afflicted with the mind of a prostitute, could believe in this declaration and still desire to be a member of the Irish Bar. It is quite clear that no man of honor can be an officer of both systems. It is not consistent with the duty of a barrister that he should assist in depriving the Irish people of the protection of their own public Courts. The institution of these sham tribunals is an invasion of the liberty that it is the privilege of the Irish Bar to protect. Upon these grounds the Council acted.

"Behind this looms a question that all are trying to ignore. Originally the Sinn Fein movement was directed to changing the political government of Ireland. The political government, as we all appreciate, is English. No Irishman has any effective voice in legislation, taxation, international relations, fiscal policy, or the appointment of administrative officers in Ireland. All these functions of political government are exercised by Englishmen, and the overwhelming sentiment of Ireland demands a change. The jargon of opposition to British government has become conventional, and becoming conventional has ceased to be appreciated. Today, Sinn Fein has ceased to lead in Ireland. Sinn Fein in its ignorance enlisted crime as its servant to fight 'British government.' Today crime is the master and Sinn Fein is the slave.

"Of all the factors of civilization the Catholic Church in Ireland has suffered most. No bishop has been shot and no chapel has been blown up, but the authority and prestige of the Church have been suffocated. Another power has established itself as the moral instructor of Irish youth. A secret society boasts of its immunity from censure. The administration of justice depends upon the Pulpit more than upon the Bench. If the meddling of English politicians tainted the Irish Bench, the neglect of the education of the magistrate, the witness and the juror has been far more disastrous. It seems to have been nobody's business to teach the community what its own interests were in maintaining the system of legal administration that for many years before the war had proven its efficiency in the protection of peace and of personal freedom. No one is attempting to teach it now. The murderers' philosophy goes uncontroverted, spreads abroad on the wings of a leprous press.

"The Downing street poltroons do nothing. Of this growth of savagery and decay of civilization the Irish Bar may be the victim—but it must not be the slave. Yours,

"A. M. SULLIVAN.

"Altoona House, Dublin, July 7."

Hampton L. Carson

President American Bar Association

RECENT STATE CONSTITUTIONAL REACTIONS

Survey of the Work of Law Creators in Nebraska and Illinois Shows Little Evidence of Radicalism and Few Startling Departures

THE NEBRASKA CONVENTION

THE work of the Nebraska Constitutional Convention, to be submitted to the voters of that state at a special election Sept. 21, 1920, is of more than ordinary interest. It affords a means of appraising post-bellum constitutional reactions in a great American commonwealth. During our actual war period—in fact, from the outbreak of the European war—there was, as all know, much speculation as to possible changes in the public mind and attitude and the possible ultimate reflection of these changes in constitutional and other fields. Have these been such as to carry the voters and their representatives towards radicalism, further in the direction of conservatism, or where? Here is an authentic document from which valid conclusions ought easily to be drawn.

Broadly speaking, the answer to this question found in the work of the Nebraska constitutional convention is that familiar constitutional ideas and the familiar direction of recent constitutional change in American commonwealths remain unaffected. There are, indeed, certain provisions therein directly ascribable to the influences of the recent troubled time. One is the proposed amendment declaring that the English language is the official language of the state and that not only all official proceedings, records and reports shall be in that language, but also that "the common school branches shall be taught in said language in public, private, denominational and parochial schools." Another is the authorization of laws for the investigation and determination of controversies between employers and employes in any business affected with a public interest and for the prevention of unfair business practices and "unconscionable gains" in any business affecting the public welfare. Another, possibly, is the amendment permitting the legislature to regulate the rights of aliens in respect to the acquisition, ownership, enjoyment or descent of property, thus removing certain legislative limitations in the present instrument. Amendments abolishing all discrimination as to suffrage on account of sex and providing that every elector in the military or naval service of the state or the United States may vote, under such regulations as may be provided by law, certainly represent, to some extent, at least reactions of the war and post-war period. But apart from these, the principal proposed changes follow lines of constitutional alteration marked out clearly since 1900.

Perhaps the most notable single feature of the convention's work is the tendency to remove limitations on legislative action. "The constitution should be sufficiently elastic to meet such changing conditions," says the official address of the convention to the people of Nebraska, referring specifically to an amendment removing the existing prohibition of the creation of additional executive offices.[1] This idea is sufficiently marked in the treatment of other provisions of the present constitution. This is, of course, a continuation of the movement that has been justly characterized as "the most important single development with respect to legislatures" since 1900.[2] It likewise reflects the opinion of constitutional students and the growing popular view that attempts in a constitution to deal with matters properly legislative in character are not sound constitutional practice and tend to impede needed changes and reforms, increase the burdens of the courts, and deprive the instrument of that superior position in public estimation to which the fundamental law is entitled.

Specifically illustrative of the tendency to remove limitations on the legislature are amendments giving that body authority to increase the number of departments; to fix all salaries for state officers; to regulate the rights of aliens in respect to the acquisition, ownership, enjoyment and descent of property; to authorize a verdict in civil cases by not less than five-sixths of the jury; to make certain changes in court organization with the object of facilitating the administration of justice; to determine the length of the school term which shall entitle the school to a share in the public funds; to classify all property except real estate, tangible property and franchises for taxation and impose taxes uniform as to class on it.[3] All these amendments broaden the legislative power, as compared with that it possesses under the present constitution. It is difficult to characterize any of these propositions as either radical or conservative. On their face, at least, they are business propositions, primarily adopted to facilitate the business administration of public affairs.

Of these amendments that relating to the classification of certain sorts of property for taxation has wide interest. This is, of course, a concrete result of the general movement for more scientific taxation that has reached a large majority of the States. Provisions authorizing the classification of property for purposes of taxation have already been submitted in 20 states and have been adopted in eleven.[4] The proposed Nebraska amendment retains the present general property tax method as to real estate, tangible personal property and franchises but permits the legislature to classify other property and levy taxes uniform as to class upon it. The main idea is to reach a large amount of intangible property which now escapes taxation. It is in line with the experience of States which have managed to increase the income from "intangibles" to a considerable extent by specific treatment of that elusive class of property.

The initiative and referendum proposal makes certain changes in the present plan. It reduces the number of voters required on petitions to initiate a law from 10% to 7%, to initiate a constitutional amendment from 15% to 10%, and to refer a law from 10% to 5%. The law so referred, however, is not to be suspended in operation unless the petition is signed by 10% of the voters. "These amendments reducing the percentage of voters," we are informed in the offered address, "were deemed advisable on account of the increased number of voters by suffrage being extended to women." It may be noted in passing that the argument for the reduction is here based on the increase in the electorate, thus necessitating much

1. Official Address, p. 8.
2. Procedure and Problems of the Constitutional Convention; Bulletin of Ill. Leg. Ref. Bureau, p. 44.
3. Proposed Amendments to the Constitution of the State of Nebraska. An Official Statement of the Constitutional Convention.
4. Procedure and Problems of the Const. Convention: Bulletin of the Ill. Leg. Ref. Bureau, p. 47.

greater labor in getting up petitions, rather than with dissatisfaction with the size of the percentages under present conditions.

Judicial reorganization is a subject of interest and importance at present. One amendment to the judicial article requires the concurrence of five of the seven members of the Supreme Court to declare a law unconstitutional. "A legislative act should stand as expressing the people's will unless it is clearly in violation of some provision of the Constitution," the convention address declares. Similar action has already been taken in Ohio and North Dakota, which have adopted amendments prohibiting holding a law unconstitutional if more than one judge of the highest State court dissents. Another amendment authorizes the legislature to establish courts inferior to the Supreme Court, thus permitting the creation of an intermediate appellate court. This right has heretofore been denied by a constitutional provision limiting the legislative power in this direction to the creation of courts inferior to the district courts. Further amendments are thus commented on in the official address:

> The new section 2 authorizes the Supreme Court to sit in divisions, the chief justice sitting in each division, four judges being necessary to constitute a quorum, but the concurrence of only three judges being necessary to pronounce a decision. This provision will eliminate the difficulties encountered by the Supreme Court when sitting in divisions under the present constitution requiring the concurrence of four judges to pronounce a decision. Furthermore, under this new provision, if it is deemed advisable, the Supreme Court may call in district judges to sit with Supreme Court judges and thereby create two divisions of the Supreme Court of five judges each, for the purpose of disposing of a congested docket. Electors will observe that this system will expedite the work of the Supreme Court without additional expense to the taxpayer.

Another amendment to the judicial article gives the Supreme Court power to promulgate rules of practice and procedure for all courts, not inconsistent with legislative acts—a step in the direction of conferring the rule making power on the body best fitted to exercise it. Provision is also made for electing six judges of the Supreme Court from six separate districts, the chief justice to be chosen from the State at large. The idea behind the election by districts is that the electors will have a chance to become better acquainted with the candidates and their qualifications and that, moreover, the various sections of the State will thus be assured of representation on the highest court. The Supreme Court is required to prepare and recommend to the legislature a budget of estimated expenses of the court for each biennium and it shall also, when requested by the legislature, certify its conclusions as to desirable amendments or changes in the general laws governing practice and procedure in the various courts. The judges of the district court are to hold court for each other when required by law or when "when ordered by the Supreme Court," the words quoted representing an addition for the purpose of expenditing court business.

Budget reform is an important part of the revised constitutional plan of Nebraska. The Governor is to prepare a budget with expert assistance and submit it to the legislature. That body may reduce but not increase it save by a three-fifths vote. "The proposal," we are told, "does not increase the power of the Governor. Under the present constitution the Governor may veto an item. It requires the same vote to overcome a veto as is required under the proposal to raise a budget item. The difference is that under the budget the Governor must announce his position before the legislature acts, while under the present constitution the Governor may veto after the legislature acts." This budget plan is not so far reaching as those adopted by amendment in Maryland, Massachusetts and West Virginia, which deprive legislatures of the power to make increases in estimates so submitted.[5] But it assuredly provides a more accurate and effective method of balancing public income and expenditure, and is distinctly in accord with a great State and national movement for change of this character.

Conservation is recognized by a certain entirely new section "designed to protect the use of the water in the streams of the State for power purposes against spoliation by private concerns"[6] and providing for the leasing and development of the same in such manner as the legislature may provide. There is also an amendment forbidding the alienation of natural resources on or contained in state land, but authorizing leasing or development of the same. The amendment authorizing laws for the investigation and determination of controversies in any business or vocation affected with a public use and with the prevention of unfair practices and profiteering therein provides that an industrial commission may be created for the purpose of administering such laws and that appeals may lie to the Supreme Court from the final orders and judgments of such commission. "This is a most important amendment," the convention address states; "under the terms of said amendment the legislature may provide for full and fair investigation of the facts and publication of the findings of such commission in all cases of difference between employer and employee and provide for adjustment of all such differences in all the vocations and businesses to which the provisions of the amendment apply. Strikes and lockouts may be avoided thereby and save to the employer, employee and public the enormous expense, inconvenience and suffering entailed by such troubles."

5. Procedure and Problems of the Const. Con.: Bulletin Ill. Leg. Ref. Bureau, p. 42.
6. Official Address, p. 14.

THE ILLINOIS CONVENTION

THERE have been submitted to the Constitutional Convention by the various delegates, and referred to the various committees, approximately 350 proposals. To summarize them all would not be helpful because no committee has favorably reported, or will favorably report, any proposal substantially as submitted. Each committee considers all proposals referred to it and then makes up a proposal of its own. A considerable number of these committee reports or proposals have already been submitted, and this summary will be confined to the subjects considered in those reports.*

First among these should be mentioned the proposal to limit Cook County's vote in the State Legislature. This proposal has not merely excited more controversy than any other before the Convention but, in the writer's judgment, a satisfactory settlement of this question is vital to the satisfactory consideration by the Convention of the many other important proposals.

The great majority of the delegates from

*The Illinois Constitutional Convention has not yet completed its labors. But it had sat for several months before taking a recess and its proceedings in committee and in open sessions have afforded Mr. Miller, a member of that body from Chicago, reasonable data for commenting on the important tendencies and results to date.

"down state" (meaning all of the delegates other than those from Cook County) have, from the beginning, claimed that before the proposition for a Constitutional Convention was submitted to the people for ratification it was tacitly agreed by all those advocating and promoting the Constitutional Convention that there should be a limitation of Cook County's vote in the Legislature. Without attempting in any way to controvert or discuss that contention, it must, I think, be conceded that there was no agreement, tacit or otherwise, by the parties promoting the Constitutional Convention, as to the extent of the limitation, if any, of Cook County's vote in the Legislature.

But a majority of the "down state" delegates came to the Convention with the set purpose, apparently, of writing in the Constitution a provision that Cook County should at all times have a clear minority in each house of the Legislature—in other words that the State of Illinois outside of Cook County should perpetually control the policies of the State. The theory of the "down state" delegates apparently, was that their position was fair enough in view of their willingness to give Chicago and Cook County a large measure of home rule.

The Cook County delegates, on the other hand, with a fair degree of unanimity, took the position that while they conceded that it might be necessary, in view of Cook County's fast growing population as compared with the rest of the State, to limit Cook County's vote in one house of the Legislature, nevertheless it would be intolerable that a minority of the voters of the State should be given the perpetual right to control Chicago and Cook County in all matters not purely local. And the more this matter was discussed the more set and determined, I think, became the Cook County delegates that their position in this regard was absolutely unassailable. Before another federal census is taken, Cook County will probably contain a majority of all the voters in the State. The argument is made that Chicago contains a vast number of citizens of foreign birth; that its population is largely industrial and that radical ideas thrive more readily in an industrial than in a rural community; and that no one County, and certainly no one County whose population is composed as is that of Cook County, should dominate the whole State. Granting the soundness of this argument, it by no means follows that the majority, though centered in one County and though composed as above described, should be dominated, out-voted and ruled by a minority of the voters of the State. It may be that the balance of the State will be entitled to protection against Cook County when that County contains a majority of the voters of the State. But it is also true that that County, when containing a majority of the population and wealth of the State, and paying a vast majority of the taxes, and furnishing a majority of the fighting men in time of war, will be equally entitled to protection against dominance by a minority. If there is danger that the majority residing in Cook County would legislate unfairly to the balance of the State, surely there is equal danger that the minority residing outside of Cook County but having a majority in the Legislature, would be unfair to the interests of Cook County.

The determination which the majority of the "down state" delegates have until very recently manifested, to put through a limitation of Cook County's vote in both houses of the Legislature, tended to make a division in the Constitutional Convention where none existed before—between the Cook County delegates on one hand and the "down state" delegates on the other. I think I am not unfair in saying that in the last days before the adjournment of the Convention for the summer, a marked tendency developed for each delegate to consider each proposal before the Convention from the standpoint of the interests of his own particular section of the State. I attribute this disposition to the acrimony developed from the apportionment debate and to the natural tendency to apply the narrow viewpoint which crept into that controversy to every other question which arose.

For this reason I was very glad to see the Convention recess until September 21st; for by that time I hope to see a reasonable compromise reached between the Cook County delegates and the "down state" delegates upon this troublesome question. I would regard a limitation of Cook County's vote in one house of the Legislature as probably inevitable, and am not disposed to combat it. I have a very strong hope that the "down state" delegates will see that a limitation in both houses is impossible, unfair and undesirable. And if a compromise along these lines shall be reached, I believe that the Convention can again go to work as a whole, harmoniously, with splendid prospects of wisely solving the many other important pending questions.

Perhaps next in importance of all the matters before the Convention is the Revenue Article. What remedy shall be applied to cure the present intolerable situation under which the owner of intangibles imposes an unfair burden on his neighbor if he fails to return those intangibles for taxation, and subjects himself to practical confiscation of those intangibles if he does return them for taxation?

The Committee on Revenue, Taxation and Finance favorably reported a measure on July 1st, which authorizes the Legislature to classify intangibles for taxation; to levy an income tax and also to classify incomes between those derived from property and those not so derived; and to make the income tax progressive, provided the highest rate shall not exceed six times the lowest rate; and to exempt from payment of the income tax $500 to the person whose income is less than $1,000 and to exempt $1,000 to the head of a family whose income is less than $2,000. It is also provided that taxes levied by valuation upon property shall be deducted from the tax on income derived from the same property; and the Legislature is authorized to substitute the income tax for the property tax.

These are the strikingly new features of the proposed Revenue measure. They will invite vigorous debate. There is little opposition to the income tax. The average delegate, like the average citizen, regards a fair income tax as the fairest of all taxes. But delegates also naturally consider that the Federal income tax has been pushed to the point where it is grossly unfair and destructive. Many are opposed, on principle, to a graduated income tax. But there are practical difficulties with a uniform income tax that are hard to overcome. For instance, it is plainly desirable that incomes as low as $1,000 be taxed to some extent; for all citizens receiving

the protection of the Government, should, if they are able, contribute to some extent to its support. But a $1,000 income would scarcely bear a tax of more than 1%, and a tax of 1% on all incomes would not yield sufficient revenue to take the place of property taxes on personal property.

The Committee on Judicial Department has made a partial report. The work of the committee was divided into two parts—the first division relating to the Supreme Court and Appellate Courts and the courts of original jurisdiction outside of Cook County; the second to the courts of original jurisdiction within Cook County. The partial report already made relates to the first division.

This proposal, favorably reported to the committee, first places the power to prescribe rules of pleading, practice and procedure in the Courts instead of the Legislature; but gives the General Assembly a veto power. This will be a tremendous step forward. The Supreme Court of the United States now has power to make rules of procedure in equity, bankruptcy and admiralty cases, and a bill is pending in Congress to authorize the Supreme Court to make rules of practice in cases at common law. A few of the States have granted this power to their Supreme Courts. If the above mentioned bill shall pass Congress (and the prospects seem to be favorable) it is but a reasonable hope that the various States will follow suit, and we shall then have definite promise of a uniform system of law practice throughout the United States. For, on the assumption that the Supreme Court of the United States will frame a simple, workable system of practice for trials at common law, what is more natural than that the various State courts should adopt that system?

In this proposal the Supreme Court is given exclusive power to make rules of practice; but the lower courts may make rules not inconsistent with those prescribed by the Supreme Court. Another innovation contained in this report is the addition of two judges to the Supreme Court, making nine in all. One Supreme Court judge is to be elected from each district except the first (embracing Cook County), and the first is to have three judges. All of the Supreme Court Districts, including the first, are to remain as now constituted until otherwise provided by law. Of course, the First District contains more than half the population of the State and furnishes to the Supreme Court more than two-thirds of its business.

This proposed article also gives the Supreme Court the power to assign an Appellate Court judge to sit as a member of the Supreme Court in the event a member of the latter court shall be unable to perform his duties, or in case of a vacancy on the Supreme bench.

By this proposed article the judges of the Appellate Court are to be appointed by the Supreme Court and their term of office is to be six years. This is a long step in the right direction. The Supreme Court judges have a very lively and ever present interest in having a strong Appellate Court. They should be able to judge better than any other appointing agency of the fitness of their proposed appointees. Why should they be limited in their choice to the members of the Circuit or any other bench?

No report has yet been made relating to the judiciary structure peculiar to Cook County. Probably the Circuit, Superior, County, and Probate Courts will be consolidated. Probably the office of Justice of the Peace within Cook County will be abolished. The Committee members are seriously considering the consolidation of the Municipal Court and the Criminal Court and the assigning by the Supreme Court of judges to the Criminal Court from the chosen body of Municipal Court judges, the Municipal Court judges while sitting in the Criminal Court to have salaries equal those of the Circuit Court judges. The Committee has also in contemplation the extension of the jurisdiction of this court throughout the County, so as to give it jurisdiction of all cases now handled by the Justice of the Peace.

A proposal has been introduced providing for the appointment by the Supreme Court, or by the Governor with the concurrence of the Supreme Court, of all Cook County Judges. How this proposal will fare at the hands of the Convention is as yet altogether uncertain. That there is no such thing as a popular choice of judges in Cook County is conceded by all. Where there are seventy-five or more judges to be chosen and a voting population of a million or more, it is plain that not one out of ten thousand of the voters can know anything about all of the candidates and that the choice, therefore, is no more intelligent than would be the election by popular vote of all the school teachers of Chicago. While all this is conceded, some of the Cook County delegates fear that the voters would resent their supposed deprivation of a right which they cannot possibly exercise, and that they cannot be adequately educated to see that the voter is compelled to choose between two courses, and two only, viz.—that they must either delegate this appointing power to some agency that may intelligently choose the judges, or they must themselves abandon the choice of judges to a self-appointed, selfish agency like the ward committeemen, whose aim must necessarily be not to secure the best material for the bench, but to build up a party organization.

On the other hand, it is a striking fact that no single proposal now pending before the Convention has been advocated by so many disinterested citizens of Chicago as this very proposal to select the Cook County judges by appointment.

The Committee on Bill of Rights has favorably reported a proposal that the defendant in any criminal case, except a capital case, may waive a trial by jury, and that the trial of a civil case by a jury of less than twelve may be authorized by law. This Committee has further proposed that a person may be held to answer for a criminal offense upon information filed by leave of a Court of Record granted after a preliminary hearing. All these proposals from this Committee are steps in the right direction and will probably pass the Convention. This same Committee has favorably reported a provision for excess condemnation beyond the amount of land actually required for the public improvement, in cases where the court shall hold that the public interest requires it.

One of the striking innovations contained in the report from the Committee on Legislative Department is the proposal that every bill shall be read "by title" instead of at large, on three different days in each house. This provision, however, is modified by these words: "But the rules of

either house may provide for the reading of bills at greater length on second or third reading." It is, of course, notorious that the constitutional provision that bills should be read at large is of necessity disregarded. If it were observed, no legislative session would be long enough to listen to the reading of the bills alone, if no other work were done.

In this same report is contained a provision authorizing the legislature to give employes of the State or any governmental division thereof a contractual right in any moneys contributed by them or by the State for pension funds. This provision was vigorously debated in the Committee of the Whole, and upon the first vote was defeated; but a reconsideration was had, and the proposal was then adopted by the Committee of the Whole.

One of the very interesting questions pending before the Convention is the proposal to limit election days to two in each year and to make those days legal holidays. This proposal has strong support. Too many persons fail to keep in mind the perfectly obvious fact that if we overburden the voter with voting duties, he is bound to default; and the result is that public officials are elected by a small self-constituted body of men who make a business of politics, known as the organization. This overburdening of the ballot may be by too frequent election days; by requiring the voter to vote for too many candidates; and by requiring each voter to act as a legislator and vote on various legislative bills. In Chicago we sometimes have had as high as 433 names on a single ballot; and we have many election and primary days in each year. If the average voter should take the necessary time to qualify himself to make intelligent selections from all those candidates on all those different voting days, it is clear that he would have little time left for anything else. Hence, the average voter defaults.

This brings us to another of the most interesting subjects before the Convention—the Initiative and Referendum. A majority of the Committee on that subject has favorably reported a proposal for an Initiative and Referendum upon legislation. It is provided therein that six per cent of the state's electors may by petition propose an act. This must be filed with the Secretary of State sixty days before the convening of the regular session of the General Assembly. Such proposed act becomes a bill in each house, and unless within six months after such convening date this bill becomes law without change, such bill shall be submitted to the voters at the next general election. If approved by not less than one-third of the total vote at the election, it shall become law. But if the measure shall fail in either house to receive the votes of one-fourth of the members elected, it shall not be submitted to popular vote.

It is further provided that five per cent of the electors by petition may stay the time of taking effect of any act of the General Assembly until its submission to the voters at the next general election, and when so submitted, it shall become law only upon receiving the same vote above specified. Certain acts declared by a two-thirds vote of each of the two houses to be an emergency act are exempted from this referendum. It is also provided that no act shall be submitted by initiative petition which authorizes a single tax; or relates to racial or religious institutions; nor may there be a referendum upon an act making appropriations of the ordinary expenses of the state government and institutions, or affecting the procedure of the courts.

This majority report provides for an indirect initiative only, and does not provide for amending the constitution by the initiative petition route. The minority of the Committee, however, presented a report in favor of a wide open Initiative and Referendum without limiting the initiative to legislation, but extending it to the constitution. One hundred thousand petitioners under this minority report, constituting about 4% of the voters of the State (including the women voters) can initiate an amendment to the constitution, and by a majority of those voting upon the subject, may adopt the proposal and amend the constitution, and this regardless of the fact that the vote upon that subject of the amendment to the constitution may constitute but a small fraction of the total number of electors. This is the system prevailing in California, Oregon, and some of the other far Western States, whose constitutions are amended very frequently, and by a very small minority of the electors. It is a safe guess that the provisions of this minority report will not find favor with the Convention. It is doubtful if even the indirect Initiative or the Referendum provided in the majority report, will receive the support of the Convention.

AMOS C. MILLER.

NEW HAMPSHIRE CONSTITUTION

At the convention of delegates assembled at Concord, N. H., at an adjourned session on the second Tuesday of January, 1920, for the purpose of revising the constitution of the state, seven amendments were agreed on to be submitted to the voters for ratification at the State election to be held in November next. Two of these relate to taxation, and the others severally to representation in the General Court, to the veto power of the governor, to exemption from military service, to eliminating the word "Protestant" from the constitution, and to pensions.

The first amendment provides that the General Court (which is the official designation of our legislature) "shall have full authority and power to impose and levy taxes on incomes from whatever source derived, which taxes may be classified, graduated, and progressive with reasonable exemptions."

The second provides that "taxes on property when passing by will or inheritance may be classified, graduated and progressive, and with reasonable exemptions."

Heretofore, we have had no "Income Tax" and the article relating to inheritance taxes contained no provision permitting such taxes to be graduated or classified. These provisions are in line with the present day tendency to tax the earnings and accumulations of the efficient and thrifty. The first provision will probably be defeated and the second one ratified.

The third proposed amendment provides that the governor may approve or disapprove any separate appropriation contained in any bill or resolution passed and presented to him by the legislature. This measure is intended to diminish the

procedure known as "Log Rolling" and will probably be adopted.

The fourth amendment provides that the membership of the lower house of the legislature shall be limited to not more than 350 members. It is of no general interest except that New Hampshire has heretofore had one of the largest representative bodies in the world. With a population of about 300,000, its representatives numbered a little over 500. Of late, the smaller towns have been losing and the cities and larger towns gaining in population, which has caused dissatisfaction, as it gave the cities a larger representation than seemed reasonable. A similar provision was defeated when submitted in 1912.

The fifth provides for eliminating from the constitution the provision exempting persons from bearing arms who have conscientious scruples against war.

The sixth provides for the discontinuance of the word "Protestant" in article 6 of the Bill of Rights. The present provision reads as follows: "The people of this state have a right to empower and do hereby fully empower the legislature to authorize from time to time the several towns * * * within this state to make adequate provisions at their own expense for the support and maintenance of public Protestant teachers of piety, religion and morality. Provided * * And no person of any one particular religious sect or denomination shall ever be compelled to pay towards the support of the teacher of another persuasion, sect, or denomination." Although the above provision has been a dead letter for a long time, other denominations desire that it be struck out. A similar amendment was defeated when submitted in 1902 and 1912.

The seventh and final proposed amendment extends the time for which pensions may be granted, and will allow them to be continued indefinitely. At the present time pensions can only be granted for one year. This amendment will probably be carried. It is designed for the benefit of state and public employees and officials who have given long or life service to the state, and who are usually relieved after disability or on attaining the age of seventy years.

Joseph Madden.

SIGNIFICANT PHASES OF CURRENT LEGISLATION

Declaratory Judgments—Judicial Action in Labor Disputes — Arbitration — Rhode Island's New Corporation Law

DECLARATORY JUDGMENTS

THE NEW JERSEY chancery act of 1915 provides that: "Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested."[1]

Florida[2] in 1919 passed an act similar to but broader in scope than the New Jersey legislation of 1915. Michigan and Wisconsin, also in 1919, enacted laws going much further than the legislation of New Jersey and Florida. The Michigan legislation is the broader in scope. The Michigan statute broadly enacts that:

> No action or proceeding in any court of record shall be open to objection on the ground that a merely declatory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed or not, including the determination, at the instance of anyone claiming to be interested under a deed, will or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested.

The Michigan statute, although brief, also provides in the broadest manner for the settlement of issues presented to the court in proceedings so authorized.[3] The Wisconsin act of 1919 is briefer and narrower in character than that of Michigan and provides:

> Equitable actions to obtain declaratory relief may be brought and maintained in the circuit court and in matters of which the supreme court has original jurisdiction in the supreme court, and it shall be no objection to the maintenance of such an action that no consequential relief is sought or can be granted if it appears that substantial doubt or controversy exists as to the rights or duties of parties, and that either public or private interests will be materially promoted by a declaration of the right or duty in advance of any actual or threatened invasion of right or default in duty. The judgment rendered in such an action shall bind all the parties thereto and be conclusive and final as to the rights and duties involved.[4]

The New York Civil Practice Act, enacted in 1920, provides by Section 473 that the Supreme Court shall have power in any action or proceeding "to declare rights and other legal relations on request for such declaration, whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment."

The statutes referred to above run counter to the generally accepted legal doctrine in this country that courts exist only to decide actual controversies between litigants as to their legal rights, the judgment of the court deciding as to such rights and execution issuing as the result of its judgment. Declaratory judgments, however, merely settle a legal issue between parties upon which their rights depend, and presupposes neither a controversy nor execution of a judgment.

They do not presuppose a wrong already done a breach of duty. They cannot be executed, as they order nothing to be done. They do not constitute operative facts creating new legal relations of a secondary or remedial character; they purport merely

1. First supplement to the Compiled Statutes of New Jersey, 1911-1915, p. 125. Sec. 51.
2. Florida Laws, 1919, No. 75. See also 20 Columbia Law Review, 106. (January, 1920).
3. Michigan Public Acts, 1919, Chap. 150.
4. Wisconsin Laws, 1919, Chap. 242.

to declare pre-existing relations and create no secondary or remedial ones. Their distinctive character lies in the fact that they constitute merely an authentic confirmation of already existing relations.[5]

Recent American legislation regarding declaratory judgments is directly copied from England. The declaratory judgment in England dates from legislation of 1850 and 1852, but the longest step toward the common use of such judgments was taken by rule of the English Supreme Court of Judicature in 1883. The English experience is summed up by Professor Sunderland as follows:

> Outside of the states which have adopted the new practice the only recourse of an American who wishes to get a forecast of his rights is to consult his lawyer. But the lawyer's opinion is without the slightest binding force. Vast interests may be at stake, but all the client can do is to gamble on the sagacity of his counsel. In England such compulsory gambling has long been outgrown. The client consults his lawyer, the lawyer, in case of doubt, frames a case for the court, and the court, on a full hearing *with all interested parties before it*, makes a final and binding declaration on which the client can act with perfect security. The practice is so convenient and so obviously advantageous that it has become almost a matter of course in English chancery cases and is very common on the law side of the court.

No effort is made here to comment on the use of or the experience with declaratory judgments in England and other countries. For a full review of the matter resort should be had to the articles of Professors Sunderland and Borchard. The literature upon this subject in legal periodicals seems to have had a real influence in producing the legislation here commented upon. The use of declaratory judgments has been recommended by the American Judicature Society. Bar Associations in Connecticut and California have recommended legislation upon the subject and proposed legislation has been under consideration by Congress.

The statutes enacted in New Jersey, Florida, Michigan and Wisconsin and New York do not involve the only cases or the earliest ones in which some use has been made of declaratory judgments in this country. Illinois added to her chancery act in 1911 a provision that: "The court may hear and determine bills to construe wills, notwithstanding no trust or question of trust or other questions are involved therein."[6] A number of proceedings authorized by statute in the several states have some of the characteristics of declaratory judgments, and a review of such proceedings in California has recently been made.[7]

One of the earliest provisions for a declaratory judgment in this country is that involved in a New Jersey Act of 1873. This act provides that within one year after an act or joint resolution has been filed with the secretary of state, if "the governor or the person administering the government shall have reason to believe that any such law or joint resolution was not duly passed by both houses of the legislature, or duly approved as required by the constitution of this state, he may, in his discretion, direct the attorney general to present a petition to the supreme court of this state, setting forth the facts and circumstances, and praying that the said law or joint resolution may be decreed to be null and void." Two or more citizens are also authorized to present a petition to the court, in the same manner as is the attorney general when directed by the governor.[8]

Though the judicial theory is distinctly otherwise, it is probably true that in practice the greater number of cases in state courts in recent years testing the validity of statutes have been agreed cases presenting no other controversy between the parties than that as to the validity of the statute at issue. The growth in the use of injunctions to test constitutionality is one evidence of this; and to the extent that the legal issue as to constitutionality is the only one between the parties, judgment in such a case is really a declaratory judgment.

In seven states of this country, state constitutions require the highest court to give advisory opinions under certain conditions to other departments of the state government. Constitutional provisions in the seven states vary as to the conditions under which opinions may be required and as to who may ask for opinions. The theory of advisory opinions originally was that the court should to some extent serve as a legal advisor upon important questions, and that such opinions should not be controlling as judgments of the court. There has, however, been a growing tendency in the courts themselves to regard such opinions as authoritative; and to the extent that they are regarded as authoritative, they become substantially equivalent to declaratory judgments.[9]

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5. E. M. Borchard. The Declaratory judgment—a needed procedural reform. 28 Yale Law Journal, 1, 5, 105 (Nov., Dec., 1918). For full discussion of declaratory judgments see Borchard's articles. See also James M. Kerr. Declaration of rights without consequential relief. 53 American Law Review, 161 (March-April, 1919), and Edson R. Sunderland, The courts as authorized legal advisors of the people, 54 American Law Review, 161 (March-April, 1920).

6. Hurd's Revised Statutes of Illinois, 1917, Chap. 22, Sec. 50.

7. Maurice E. Harrison. The declaratory judgment in California. 8 California Law Review, 133 (March, 1920).

8. New Jersey Compiled Statutes (1910) Vol. 4, p. 4978. See In re "An Act to amend an act entitled 'An Act concerning public utilities,'" 88 N. J. Law, 303 (1912).

9. For a full review of advisory opinions, see A. R. Ellingwood. Departmental Co-operation in State Government. New York, 1918.

JUDICIAL ACTION IN LABOR DISPUTES[1]

SINCE the passage of the Clayton Act by Congress in 1914, a vigorous effort has been made to obtain from state legislatures statutory enactments regarding injunctions and the conduct of labor disputes similar to the provisions embodied in the federal statute.

The movement in the states, however, began befor the passage of the Clayton Act, and was responsible for the passage of laws in California[2] in 1903 and in Massachusetts[3] in 1914. The Massachusetts act was declared unconstitutional, and the California act said to be invalid if denying injunctive relief to individuals. New Jersey[4] legislation of 1883, legalizing labor combinations, and similar Pennsylvania[5] legislation running from 1869 to 1891, have been interpreted as doing nothing more than making sure that combinations of laborers are not subject to the old common law of conspiracy. The legislature of Kansas in 1913 enacted a law, the substance of which is similar to sections 17 to 20 of the Clayton Act. Montana enacted a law in

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1. For discussions of recent legislation with respect to labor disputes see Illinois Constitutional Convention Bulletin No. 14, and 20 Columbia Law Review, 696 (June, 1920).

2. California Statutes, 1903, p. 289. Goldberg v. Stablemen's Union, 149 Cal. 429 (1906). Pierce v. Stablemen's Union, 156 Cal. 70 (1909).

3. Massachusetts Laws, 1914, Chap. 778. Bogni v. Perotti, 224 Mass. 152 (1916).

4. Compiled Statues of New Jersey 1910, vol. 3, p. 3051. Jonas v. Glass Bottle Blowers' Association, 77 N. J. Eq. 219 (1908).

5. Purdon's Digest, 13th Ed. Vol. 4, pp. 4807-4811. Erdman v. Mitchell, 207 Pa. 79 (1903).

1913 that an injunction should not be granted "in labor disputes under any other or different circumstances or conditions than if the controversy were of another or different character, or between parties neither or none of whom were laborers or interested in labor questions." The Montana court has said that this legislation adds nothing to pre-existing law.[6]

The influence of the Clayton Act appears in the legislation of Minnesota and Utah[7] in 1917, and in that of North Dakota, Oregon, Washington, Wisconsin and Iowa[8] in 1919. Minnesota legislation of 1917 declares labor not a commodity or article of commerce, and forbids the use of injunctions in certain cases, using much the same language as section 20 of the Clayton Act. The Utah law of 1917 closely parallels sections 6, 20 and 22 of the Clayton Act. It declares labor not a commodity or article of commerce, limits the use of injunctions in labor cases, limits the penalties for contempts, and provides for jury trial in contempt cases. Of the laws enacted in 1919, those of Oregon, Washington, Wisconsin and Iowa agree in the declaration that labor is not "a commodity or article of commerce." In addition to this declaration the Iowa act merely excepts organizations of labor from the terms of earlier legislation relating to combinations, pools and trusts. The other acts of 1919, in addition to general declarations as to the character of labor and the lawfulness of combinations of labor, deal with the subject of injunctions in much the same manner as the Clayton Act, though none of them prescribe jury trial in contempt cases as do the Clayton Act and the Utah legislation of 1917. The 1919 acts of North Dakota, Oregon, Washington, and Wisconsin enumerate, as does the Clayton Act, a series of acts in connection with labor disputes which shall be deemed lawful and shall not be enjoined, but the enumeration in the Washington Law is briefer than that in the others.

It remains to be seen what effect this legislation will have in limiting judicial action in labor controversies. The Clayton Act and the Utah legislation of 1917 clearly restrict the courts by permitting jury trials in contempt cases, but the United States Supreme Court has intimated that the substantive provisions of the Clayton Act do not announce any new legal policy in labor cases.[9]

6. Kansas Laws, 1913, Chap. 233. Montana Codes, Sec. 6121, as amended in 1913. Empire Theater Co. v. Cloke, 53 Mont. 188 (1917).
7. Minn. Laws, 1917, Chap. 498. Utah Laws, 1917, Chap. 68.
8. N. D. Laws, 1919, Chap. 171. Ore. Laws, 1919, Chap. 346. Wash. Laws, 1919, Chap. 185. Wis. Laws, 1919, Chap. 211. Iowa Acts, 1919, Chap. 213.
9. Paine Lumber Co. v. Neal, 244 U. S. 459 (1917), pp. 471, 483-4.

ARBITRATION

ARBITRATION as a means of settling controversies between parties has had a rapid development in recent years, though the use of arbitration is much more extensive in England than in the United States. The extent to which arbitration is now used will be found discussed in a recent number of the *American Bar Association Journal*.[1] Practically every state has an arbitration statute and such statutes provide that an arbitration award may be the basis for judgment and execution in a court of competent jurisdiction.

1. January, 1919, Vol. 5, p. 45. For a full review of English experience see Bulletin XII. American Judicature Society. A report on arbitration in England. By Samuel Rosenbaum, Chicago, 1916.

The chief difficulty with the use of arbitration in this country has been the commonly accepted legal doctrine that an agreement to arbitrate may be revoked by either party thereto at any time before an award is made. This doctrine largely defeats the plan of inserting into commercial and other contracts an agreement to arbitrate differences which may arise under the contract. The doctrine of revocability has long been abandoned in England, and Mr. Julius Henry Cohen has in a learned discussion recently shown that it is in reality not a rule of the English common law.[2]

Legislation of 1917 in Illinois (amended in 1919) and of 1920 in New York, abrogated the rule that an agreement to arbitrate may be revoked. The passage of the New York legislation was largely due to the efforts of the committee on arbitration of the Chamber of Commerce of the State of New York.

Both in Illinois and New York the recent legislation not only changes the rule that agreements to arbitrate shall be revocable, but also seeks to make provisions which will encourage the use of arbitration. The Illinois act contains one provision which is worth quoting:

> The arbitrators may on their own motion and shall by request of a party (a) at any stage of the proceedings, submit any question of law arising in the course of the reference for the opinion of the court, stating the facts upon which the question arises and such opinion when given shall bind the arbitrators in the making of their award; (b) state their final award as to the whole or part of the reference in the form of a conclusion of fact for the opinion of the court on the questions of law arising and such opinion shall finally conclude the proceedings . . .[3]

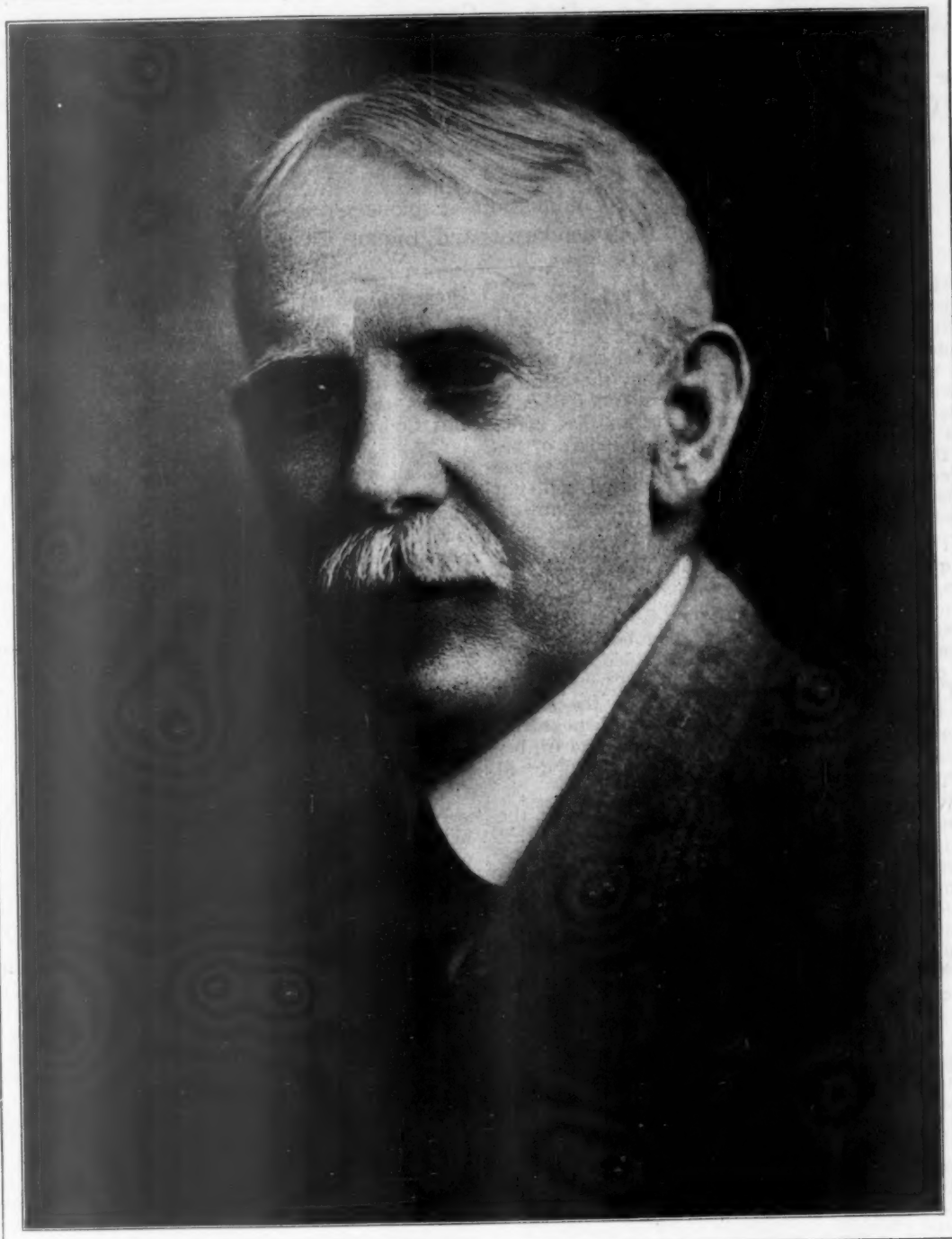
Such a use of the court as an aid in arbitration proceedings is comparable with the use of declaratory judgments discussed elsewhere in this number.

W. F. DODD, Chicago.

2. Cohen. Commercial arbitration and the Law. New York, 1918.
3. Illinois laws, 1917, p. 202; 1919, p. 216.

RHODE ISLAND'S NEW CORPORATION LAW

The new corporation law, passed at the last session of the General Assembly of Rhode Island, became effective on July 1. This act was prepared by a Commission of five lawyers appointed by the Governor of the State in 1918, under authority from the General Assembly. The act relates to ordinary business and manufacturing corporations, literary, scientific and miscellaneous corporations but only incidentally to banks, insurance companies and public utility corporations. An important provision is the elimination of the present liability of directors for debts of the corporation in excess of the capital stock. Under the new law organization fees are reduced and capital stock without par value may be issued. A corporation which is organized under the General Laws may amend its articles of association by increasing its authorized capital stock, by vote of its stockholders and the filing of a certified copy of such vote in the office of the Secretary of State, while a corporation created by special act of the General Assembly may amend its charter by a vote of its stockholders and by filing a certified copy of such vote in the office of the Secretary of State. It is thought that the new law will be most helpful in allowing Rhode Island men to safely organize corporations under the laws of their own state.



FREDERICK EUGENE WADHAMS

Treasurer American Bar Association

REVIEW OF RECENT SUPREME COURT DECISIONS

By S. S. Gregory

Case Comment on Inheritance Tax—Second Jeopardy—Contempt—Income Tax Decisions—Obligation of a State to Enforce Judgment of Another State—State Authority and Military Law—Salary of Federal Judges—Ohio's Ratification Referendum—Steel Corporation Decision—Sufficiency of Complaint Before Federal Trade Commission—Espionage Act Appeals—Prohibition Amendment and Liquor Cases, etc.

THE Supreme Court of the United States adjourned for the October Term, 1919, June 7th last and will convene again the first Monday in October on the 4th day of that month. This seems like a long vacation, but those familiar with the methods of the Court and its active participation in all oral arguments, so that many cases are undoubtedly determined either at or before the conclusion of the argument, as well as the burdens carried into the vacation period, will not be disposed to criticize this interregnum as unwarranted.

The progress of the Court, made at this term, was quite satisfactory. At the close of the October Term, 1918, on June 9th, 1919, when Court adjourned for the term, there were 408 cases on the docket undisposed of. At the October term succeeding there were 580 new cases added, making a total of 988 cases on the docket for that term. When the Court adjourned for that term on the 7th of June last, 602 of these cases had been disposed of, leaving 386 cases on the docket undisposed of, being 22 less than remained when Court adjourned for the preceding term, June 9th, 1919.

We are indebted to Hon. James D. Maher, the competent and efficient Clerk of the Court, for this intelligence. It is interesting to know that Mr. Maher has been connected with the Court as boy and man for something over fifty years. He is an excellent public officer and the atmosphere of promptness, accuracy and courtesy which pervades his office, and the conduct of all those connected with it, is in marked contrast to that found in many public offices both in Washington and elsewhere.

In making some review of the more important cases decided by the Supreme Court at the last term we are starting one of the new departments of the Journal. It is hoped that this can be done in each number of the Journal, so far as material exists, so as to keep us fairly well with the announced decisions from this exalted tribunal, and that it may be possible to refer to more of its decisions than can be done in this number when those that have been disposed of at an entire term are thus reviewed.

There is much material that must remain untouched for want of time and space, and no doubt in the selection of cases which are mentioned and commented upon it may seem to some of our readers that there has been some lack of discrimination, as is quite likely to be the case. We aim, however, to deal with cases of the greatest professional interest and importance, particularly those dealing with constitutional questions. For it must be apparent to the Bar that with the constantly increasing burdens imposed upon that Court by our national growth, and by the unfortunate tendency of Congress to increase constantly, particularly in criminal matters, by the creation of new offences, the jurisdiction of the inferior Federal tribunals, and the increase and complexity in the number of cases coming from the courts of last resort in the several States, there is a marked tendency to overburden this Court.

As such a large proportion of these cases go through the certiorari gateway, necessarily the Court must be compelled to decline to take most that are thus brought there in order to have adequate opportunity to deal with those involving important questions as to the organic law of the nation. This field of jurisprudence, peculiarly American, is so extensive, and the disposition of cases which arise in it so difficult, as is illustrated by the numerous dissents, and the right solution of such cases is so important, that it is not at all unlikely in the not distant future the appellate jurisdiction of the court may be practically limited to the final decision of such cases.

INHERITANCE TAX

In Maxwell v. Bugbee, 40 Sup. Ct. Rep. 2, involving an important constitutional question of inheritance tax law, it was determined that a Statute of New Jersey, adopting as the measure of the tax on the transfer of property within the State from a non-resident decedent the proportion that such property bore to the entire estate, did not deny to the citizens of other States the privileges and immunities secured by Par. 1, Sec. 2 of Article 4 of the Federal Constitution, nor the equal protection of the laws secured against State action by the 14th amendment, nor fall within the inhibition of the latter amendment, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. It was conceded in the learned opinion by Mr. Justice Day that a State could not consistently with the Federal Constitution tax property beyond the territorial jurisdiction of the State; but it was held that the subject matter, regulated by the Statute before the court, was a privilege to succeed to property within the jurisdiction of the State, and it was said that when the State levies taxes within its authority, property not in itself taxable by the State might be used as a measure of the tax imposed.

There was a formidable dissent in this case, as Mr. Justice Holmes wrote a short dissenting opinion, concurred in by the Chief Justice, Mr. Justice Van Devanter and Mr. Justice McReynolds. In the course of that opinion it was said that when property outside the State was taken into account for the purpose of increasing the tax upon property within it, the property outside was taxed in effect,

no matter what form of words might be used, and it was added that New Jersey could not deny to residents in other States the right to take legacies which it granted to its own citizens and therefore its power to prohibit all legacies could not be invoked in aid of a principle affecting only foreign residents.

This case was heard and decided with the case of Hill v. Bugbee, involving the question of an inheritance tax in New Jersey out of the estate of the late James J. Hill, the great railway builder of St. Paul, Minnesota.

Among the counsel against the tax were Mr. Lawrence Maxwell of Cincinnati and Mr. E. C. Lindley of St. Paul. Mr. John R. Hardin of Newark represented the State with Mr. John W. Westcott of Camden.

SECOND JEOPARDY

In Stroud v. United States, 40 Sup. Ct. Rep. 50, it was ruled that where a defendant had been convicted of murder in the first degree, sentenced for life, and then taken his writ of error, procured a reversal of the judgment, and been tried, again convicted and sentenced to execution, the verdict and judgment in the first trial did not preclude capital sentence on conviction on the second. This was based upon the ground that the plaintiff in error, having prosecuted error to reverse the judgment, was not entitled to complain because the appellate tribunal had held his errors to be well assigned and reversed the judgment accordingly, and it was said that in such cases he was not placed in second jeopardy.

This is an interesting and important distinction and marks a clear discrimination between such a case and a case where, upon indictment for murder, a defendant is convicted of manslaughter and then upon his application a new trial is granted. In such cases it has often been held that on the second trial the defendant cannot be again tried for murder; that the conviction of the lesser offense is an acquittal upon the charge of murder.

Mr. M. J. O'Donnell was one of the counsel for the prisoner in that case.

CONTEMPT

In Silverthorne Lumber Company v. United States, 40 Sup. Ct. Rep. 182, judgment for contempt having been rendered against the Lumber Company and another, for disobedience of an order to comply with subpoenas to produce papers in a transaction by the Government, this judgment was reversed on error. It transpired, as the court stated the facts, that an indictment upon a single specific charge having been brought against the two Silverthornes, they were both arrested at their homes early in the morning and detained in custody a number of hours. While they were thus detained, representatives of the Department of Justice and the United States Marshal, without a shadow of authority, went to the office of their Company and took all books, papers and documents found there to the office of the District Attorney, and took all the employes of the Company, or directed them to go also to that office. An application was made to the District Court for the return of what had thus been unlawfully taken. It was opposed by the District Attorney so far as he had found evidence against the plaintiffs in error, and it was stated that the evidence thus obtained was before the grand jury. Photographs and copies of papers were made and a new indictment was framed, based upon the knowledge thus obtained. The District Court ordered a return of the originals, but impounded the photographs and copies. It was for failure to produce the originals that the judgment of contempt was imposed.

It is thought that this case lays down a wholesome and salutary rule, unless the constitutional provision against compelling a party to give evidence against himself is to be entirely frittered away.

Mr. F. D. McKenney and Mr. M. Cohen of Washington, and Mr. William D. Guthrie of New York represented the plaintiffs in error.

INCOME TAX

The case in which it was held that, under the Sixteenth Amendment, the income tax amendment, a stock dividend is not income and cannot therefore be taxed as such under the claimed authority of an Act of Congress plainly so requiring is Eisner, Collector, v. Macomber, 40 Sup. Ct. Rep. 189. Mr. Justice Pitney wrote the prevailing opinion, announcing the conclusion of the court in this language:

> Thus from every point of view we are brought irresistibly to the conclusion that neither under the Sixteenth Amendment, nor othrewise, has Congress power to tax without apportionment a true stock dividend, made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder. The Revenue Act of 1916, insofar as it imposes a tax upon the stockholder because of such dividend * * * to this extent is invalid, notwithstanding the Sixteen Amendment.

There was an able and elaborate dissent from this judgment, Mr. Justice Brandeis writing one of the dissenting opinions, concurred in by Mr. Justice Clarke, and Mr. Justice Holmes also writing a dissent of characteristic brevity, holding in effect that the purpose of the Sixteenth Amendment was to get rid of nice questions as to what might be direct taxes, and should be construed in a sense most obvious to the common understanding at the time of its adoption and that thus construed, it justified the tax. Mr. Justice Day concurred in this opinion.

Mr. Charles E. Hughes was one of the counsel for the taxpayer in this case.

Another income tax decision is found at page 228 in the same volume, in which it was held that a State, without violating the due process provision of the Fourteenth Amendment, might impose a tax on the incomes of non-residents arising from any business or trade carried on within its borders, enforcing payment so far as possible by the exercise of a just control over persons and property within the State, and that no unconstitutional discrimination against citizens of other States was involved, either in confining the deduction of expenses, losses, etc., in the case of non-resident taxpayers to such as are connected with income arising from sources within the taxing State, nor in confining withholding the tax at the source to the income of non-residents, nor did the latter provision involve any impairment

of contract between the corporation and its employees under the facts in this case. It was held, however, that the New York income tax law did violate Sec. 1 of Article 4 of the Constitution, providing that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, by denying to non-residents a personal exemption of $1,000 accorded to residents of that State. The opinion is by Mr. Justice Pitney, and Mr. Justice McReynolds concurred in the result.

(Travis, Comptroller, v. Yale & Towne Mfg. Co., 40 Sup. Ct. Rep. 228.) Mr. Louis H. Porter of New York was one of the counsel for the taxpayer in this case.

FOREIGN JUDGMENT

An interesting question of constitutional law is presented in Kenney v. Supreme Lodge, etc., of the Loyal Order of Moose, 40 Sup. Ct. Rep. 371, error to the Supreme Court of Illinois. The action below was debt in Illinois upon a judgment recovered in Alabama. The defendant pleaded to the jurisdiction that the judgment was for negligently causing the death of plaintiff's intestate in Alabama. The plaintiff demurred to the plea, setting up the provision of the Federal Constitution, requiring full faith and credit to be given in each State to the judicial proceedings of other States. A statute of Illinois provided that no action should be brought or prosecuted in that State for damages occasioned by death occurring in another State in consequence of wrongful conduct. The Supreme Court of Illinois held that, as by the terms of that statute the original action could not have been brought there, the Illinois Courts had no jurisdiction of a suit upon the judgment. The Supreme Court reversed this judgment and held that the statute as thus construed by the Supreme Court of Illinois was invalid.

Mr. Justice Holmes, upon a review of the decisions, speaking for a unanimous court, laid down the rule that the courts of one State were bound to enforce a judgment rendered in another State, even though that judgment were pronounced upon a cause of action arising in the State of the forum which was illegal and void there, and that therefore the fact that in the case before the court the original cause of action could not have been maintained in Illinois was no answer to a suit upon a judgment obtained upon that cause of action in another State. It was also held that a State could not escape its constitutional obligation in this kind of a case by the simple device of denying jurisdiction in such cases to courts otherwise competent. This decision would appear to be undoubtedly sound, and it seems somewhat remarkable that a court of the learning and ability of the Supreme Court of Illinois should have reached a different conclusion.

Mr. G. R. Harsh of Birmingham, Alabama, represented the plaintiff in error in this case and Mr. E. J. Henning of San Diego, California, was one of the counsel for the defendant in error.

MILITARY LAW

An interesting question of military law was decided by the court in a learned and convincing opinion by the Chief Justice in Caldwell v. Parker, Sheriff, 40 Sup. Ct. Rep. 388. After reviewing the various provisions in the Articles of War from 1775 down to those of 1916, insofar as they related to the boundaries between the jurisdiction of civil and military tribunals for the punishment of criminal offences, and considering how far they were necessarily exclusive of the civil authority, the learned Chief Justice declared it to be apparent that comprehensively considered they contained no direct and clear expression of a purpose on the part of Congress, conceding its authority so to legislate, for the sake of argument, to bring about as the mere result of a declaration of war the complete destruction of State authority and the extraordinary extension of military power upon which the argument rests; and, quoting from a previous decision, he declared that, considering the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect. It followed, therefore, that this being an application originally in the District Court of the United States for the Northern District of Alabama for a writ of habeas corpus directed to the Sheriff of Calhoun County, Alabama, to secure the release of the relator from custody, followed by an appeal from a judgment denying such relief brought by the relator to the Supreme Court, where he had been convicted of murder committed in Alabama, pending the war with Germany while he was serving as a soldier in the army of the United States in a camp in Alabama, which crime was committed not within the confines of any camp or place subject to the control of the civil or military authorities, the proper court of the State having jurisdiction of the crime of murder where committed might rightfully proceed to his trial and conviction.

The opinion of the learned Chief Justice also has some especial interest in that he therein refers to the historic case Ex Parte Milligan 4 Wall. 2, decided immediately after the Civil War, as this case has been recently criticised by a high authority and supposed by some not to have been well decided. It is true that that case was perhaps largely based, to some extent, on the construction of the Act of Congress then in question and not upon its validity. Nevertheless, its recent exposition by the same high authority is not without interest.

Mr. Henry E. Davis of Washington was one of the counsel for the relator.

SALARY OF FEDERAL JUDGES

In Evans v. Gore, Collector, 40 Sup. Ct. Rep. 550, the court held that the income of a Federal Judge, arising from salary as such, was not taxable under the income tax law on the ground that Sec. 1 of Article 3, providing that the compensation of judges should not be diminished during their continuance in office, expressly prohibited such a tax levy and that therefore the income tax law was to this extent unconstitutional. The suit was brought by Walter Evans, the well known and capable District Judge of the United States for the Western District of Kentucky, to recover moneys paid by him under protest as a tax assessed against

his income as a federal judge. The court below ruled for the defendant and on error the Supreme Court reversed the judgment. It was also held that the Supreme Court could not decline or renounce jurisdiction to review the judgment in such a case because of the fact that its decision directly affected the liability of the members of that court to similar taxation.

The opinion was by Mr. Justice Van Devanter and is an able vindication of the conclusions of the court. The learned Justice quotes a letter from Chief Justice Taney, written to the Secretary of the Treasury, with reference to the income tax law of 1862. This letter was, at the suggestion of the Chief Justice, spread on the records of the court and was afterwards printed in 157 U. S. 701 at about the time the then income tax act was in question. However, in 1869 the Secretary of the Treasury referred the question raised by the communication of Chief Justice Taney to the Attorney General, and that officer held that the tax could not be properly collected, either from federal judges or from the President, and we are told by the learned Justice, writing in the case under consideration, that the tax on the compensation of the President and the judges was then discontinued and the amounts paid thereof were refunded, and he says that during a period of more than one hundred and twenty years there was but a single real attempt to tax the judges in respect of their compensation, and that attempt was soon disapproved and pronounced untenable by the concurring action of judicial, executive and legislative officers.

While the court seemed to be of the opinion that the matter might be left to rest on the concession of counsel for the government that the Sixteenth Amendment, authorizing an income tax, was not intended to render anything taxable as income that was not so taxable before, yet nevertheless the learned Justice proceeded to a careful examination of the question and reached the conclusion that the tax was imposed contrary to the constitutional provision and must therefore be judged invalid.

Mr. Justice Holmes dissented in an opinion marked by his usual acumen. He argued that the independence of the judges, so far as the constitutional provision against diminishing their salaries was concerned, would be only threatened by legislation dealing with a judge's salary as such, but this seemed to him no reason for exonerating him from the ordinary duties of a citizen, and he proceeds to give many illustrations, which illustrate his proposition that tax on net incomes is a tax on the balance of a mutual account in which there always are some and maybe many items on both sides. He argues that the moment the salary is received, whether kept distinct or not from other sources of income, it becomes part of the general income of the recipient, and he is of the opinion that former decisions of the court seem to justify his conclusion. He also finds in the language of the Sixteenth Amendment, by which Congress is given power to collect taxes on incomes from whatever source derived, authority for his position. This latter conclusion seems to be hardly warranted, as, historically speaking, we all understand that the necessity of this Amendment and its inspiration was the decision of the Supreme Court under the former Act, that an income tax was a direct tax and must be apportioned among the States in accordance with population, and that the Amendment in question was adopted particularly to meet the situation thus created. Moreover, we think the profession generally will feel that in a matter of this character the principle obsta principiis, so much relied upon by Mr. Justice Bradley in the historic Boyd case (116 U. S.), is not unimportant as a canon of constitutional construction. These constitutional limitations are not to be refined away by all sorts of nice distinctions until finally nothing but a shadow remains. The popular branch of the Government in a Democracy is necessarily the legislative branch. While a strong and determined executive, having the favor of the people, may for a time impair its authority to some extent, yet in the long run it continually absorbs and draws power unto itself. As is well understood, the judiciary is in essentials the least able to resist encroachments upon its authority. It is only by a strong, professional sentiment, aided by that innate respect for law and its ministers, ingrained in our people, that it has thus far been protected in the exercise of its constitutional authority.

There is in the Constitution a distinct provision against diminishing the salaries of judges. Let that prohibition be respected and followed, and let us not adopt doubtful experiments for the purpose of seeing how far Congress can and may go in actually reducing judges' salaries without a clear infraction of this constitutional limitation. It was intended by the Constitution to place judges in this regard in a position where they should have this protection, not a sort of qualified protection, not a protection against everything but taxation, whether income or otherwise, but a broad and absolute security that under no guise and under no pretense should their salaries be reduced after they were once in office by any form of governmental action. They are still altogether too low, and we think the American Bar, notwithstanding its great deference for the views of Mr. Justice Holmes, fully concurred in as they were in this case by Mr. Justice Brandeis, will still be disposed to stand fast upon the ancient ways and cordially concur in the viws of the majority of the court.

In this case the taxpayer was represented by Messrs. William Marshall Bullitt and Edmund F. Trabue, both of Louisville.

OHIO REFERENDUM

A very important question of constitutional law is determined by the court in Hawke v. Smith, Secretary of State, of Ohio, 40 Sup. Ct. Rep. 495, error to the Supreme Court of that State. The legislature of the State had ratified the Eighteenth or Prohibition Amendment and certified copies of the joint resolution of ratification were forwarded by the government to the Secretary of State at Washington, and to the presiding officer of each House of Congress, and thereafter the Secretary of State proclaimed the ratification of the Amendment, naming thirty-six ratifying States, including among them the State of Ohio.

A provision of the Ohio Constitution, adopted before this ratification by the legislature, provided

that the people reserved to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the Constitution of the United States.

The original suit was brought to restrain the Secretary of State from expending public moneys in preparing and printing forms of ballot for submission on referendum of the question of this ratification which the general assembly had made. The courts of Ohio, including the Supreme Court of that State, sustained a demurrer to the application of the plaintiff in error for such injunction and he thereupon carried the case to the Supreme Court. It was held by that court that inasmuch as Article 5 of the Federal Constitution provided that amendments proposed by Congress should be valid when ratified by the legislatures of three-fourths of the several States, this was a matter exclusively of national cognizance and therefore the State had no authority to require the submission of the ratification to a referendum under the State constitution, and the judgment of the Supreme Court of that State was accordingly reversed.

Although this decision was by a unanimous court, it is, nevertheless, suggested with great deference that it may well be doubted whether it is consistent with sound principles of American constitutional law. It would appear that it might be at least plausibly argued that the resolution of ratification adopted by the legislature of Ohio was not understood by that body to be final and definite action under the fifth amendment to the Federal Constitution. The organic law of that State then providing that such action should be subject to a referendum by the electors of the State, it would seem to be a legitimate conclusion that the resolution of ratification should be read as if it had incorporated in its terms expressly the provision of the constitution of the State and recited what was clearly the purpose of this provision, that the action of the legislature was taken subject to the vote of the people upon referendum as expressly prescribed in the constitution of the State. Such a ruling would have been more consonant with those canons of American constitutional law by which, while national authority is not to be restrained in its appropriate field, the State governments are permitted the free exercise of their sovereign powers without impairment except by express authority of the Federal Constitution. Had the resolution of ratification so expressly recited, it would seem that it might then well have been regarded as provisional and tentative merely and, construing Article 5 of the Federal Constitution broadly, in favor of the reserved rights of the States this method of legislative ratification was entirely consistent with that provision of the Federal Constitution. It certainly could hardly be plausible contended that such a resolution with such a recital was intended to disregard and ignore the referendum provision of the State constitution, which was afterwards held legitimate and proper by the Supreme Court of the State. It is difficult to say how the fact that the legislative ratification did not incorporate any such recital expressly in its terms alters the question presented. Moreover these are democratic days. There is a feeling that we have had too much misrepresentative government and for this reason referendum provisions have been inserted, covering a wide field, in many of the State constitutions for the purpose of correcting abuse of power by legislative authority in the States. It would seem as if the decision of the Supreme Court of the United States might well have been otherwise in recognition of the basic fact that after all the great thing in popular government, vital and essential, is that in fact as well as theory the people should rule.

It would seem also, with deference, that Mr. Justice Day, who delivered the very able opinion of the court in that case, placed the emphasis on the wrong term in his opinion. He said the only question really for determination is, what did the framers of the Constitution mean in requiring ratification by "legislatures"? It would appear that, to speak more accurately, the real question was, what did the framers of the constitution mean in requiring "ratification," and was this such a ratification as the Constitution of the United States contemplated, or was it merely tentative and preliminary and intended by the legislature of Ohio to be such, subject to the action of the people under the constitution of that State? It is true that doubts of the wisdom and propriety of the considered judgment of this august tribunal are not to be lightly entertained, and yet much has been said and much may be truly said as to the fallibility of judicial tribunals. We have only to refer to some of the great names in comparatively recent American history for illustrations of this statement — Abraham Lincoln, Charles Sumner and others. There is and there should be no such thing as any dogma of papal infallibility in considering the determinations of any such tribunal on all proper occasions. This in no way derogates from the authority of such decisions, nor the respect due to the tribunals which pronounce them. They must be implicitly followed and obeyed, whatever speculations to the contrary in our past history may have been indulged in; but they should be the subject of consideration, analysis and free criticism after they are pronounced by an independent and intelligent bar, as well as by an enlightened public-spirited press.

Mr. Lawrence Maxwell of Cincinnati appeared as counsel for the Secretary of State, of Ohio, in this case.

ANTI-TRUST ACT

The important case of the United States v. The Steel Corporation was finally determined adversely to the Government, 40 Sup. Ct. Rep. 293. The bill was brought below by the Government under the Sherman Anti-Trust Act and was there dismissed for want of equity. There was some variety of opinion in the court below, to which Mr. Justice McKenna, writing in the Supreme Court, referred. The state of mind of the majority of the court and the substance of its decision is to be found in this statement (page 297), "The alternatives are perplexing, involve conflicting considerations which, regarded in isolation, have diverse tendencies. We have seen that the judges of the District Court unanimously concurred in the view that the Corporation did not achieve monopoly and such is our deduction, and it is against monopoly that this statute is directed; not against an expectation of it, but against its realization, and it is certain that it was not realized." In fact the opinion is largely

occupied with a discussion of the questions of fact involved. The last paragraph thereof is as follows:

> In conclusion we are unable to say that the public interest will be served by yielding to the contention of the Government respecting the dissolution of the Company, or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and it may be serious detriment, to the foreign trade, and in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard.

This opinion was concurred in by the Chief Justice and Mr. Justice Holmes and Mr. Justice Van Devanter. Mr. Justice McReynolds and Mr. Justice Brandeis did not participate in the decision. Mr. Justice Day filed a dissenting opinion and in this opinion Mr. Justice Pitney and Mr. Justice Clarke dissented.

It is thought with deference Mr. Justice Day puts his finger on the weak point in the prevailing opinion at page 302, where, referring to trade combinations prohibited by the Anti-Trust Act, he says "it is the scope of such combinations and their power to suppress and stifle competition and create, or tend to create, monopolies which, as we have declared so often as to make its reiteration monotonous, it was the purpose of the Sherman Act to condemn, including all combinations and conspiracies to restrain the free and natural flow of trade in the channels of interstate commerce." He also declares that he knows of no public policy which sanctions a violation of the law, nor of any inconvenience to trade, domestic or foreign, which should have the effect of placing combinations, which have been able to thus organize one of the greatest industries of the country in defiance of law, in an impregnable position above the control of the law forbidding such combination, and he declares (page 303) that "such a conclusion runs counter to the decisions of the court and necessarily results in a practical nullification of the Act itself," and also observes on the next page as to the suggestion that complete monopoly was never attained, that "to insist upon such a result would be beyond the requirements of the statute and in most cases practically impossible." The learned Justice would probably have been quite within the bounds of reason and moderation had he stated that in any case to show that complete monopoly had been established by an illegal combination would be absolutely impossible. On the contrary it has always been the rule of the common law, a rule repeatedly laid down by the Supreme Court of the United States and recognized in cases arising under the anti-trust laws by that court, that combinations and conspiracies in restraint of trade, which tend to monopoly, are illegal; a sound and rational rule which once departed from in the construction of the Act in question leaves its longer existence, with all its absurdities and incongruities, entirely unwarranted in the opinion of the writer. If this Act were intended by Congress to promote the interests of the general people, to protect them against extortion, to insure reasonable prices in commodities dealt with in interstate commerce and to prevent the manipulation of prices by conspiracies and combinations in restraint of interstate trade, it has been probably the most colossal and monumental failure in the history of legislation.

Undoubtedly much might be said from a practical standpoint on the part of the majority of the court that the Government was too late with its suit in this case, and that all the evils of the past are not to be corrected at one fell swoop, even by an elaborate and compendious bill in equity exhibited in the name of the United States by and under the direction of the Attorney General. Commercial business has its laws, its ethics, its moralities such as they are, and its methods, and these cannot be entirely uprooted at the expense of all practical considerations of efficiency, economy in operation and convenience, even by statute and judicial decree, without a long and protracted struggle. Indeed it may well be doubted whether the chief advantage secured by this effort is not rather, in the long run, its educational and persuasive, than its immediately coercive, effect.

The Government was represented by Mr. C. B. Ames, Assistant Attorney General, and by Mr. Henry E. Colton of Nashville. Mr. R. V. Lindabury of Newark, Judge David A. Reed of Pittsburg, Mr. C. A. Severance of St. Paul and Mr. W. J. Curtis of New York represented, with other counsel, the Steel Corporation and other appellees.

UNFAIR COMPETITION

A decision of very considerable practical importance was rendered by the court in the case of Federal Trade Commission v. Gratz, 40 Sup. Ct. Rep. 572. In that case it was held that under the Federal Trade Commission Act, where the Commission directs a complaint charging an unfair method of competition to issue and after a hearing issues its order requiring the accused to cease and desist from using such method, and where the respondent applies to a Circuit Court of Appeals to set aside such order, if it appears that the complaint is plainly insufficient to show unfair competition, then the order must be vacated. It is also held in that case that a complaint was insufficient to support an order charging that sellers of cotton ties and bagging had been guilty of unfair competition where they had refused to sell ties unless the purchaser would buy from them a corresponding amount of bagging, where the complaint did not intimate that the dealers did not properly obtain these goods or state the amount controlled by them, or allege that they held a monopoly in their commodity, or had the ability, purpose or intent of acquiring one or allege anything justifying the conclusion that the public suffered injury or that competitors had reasonable ground for complaint. It was there also held that, questions of monopoly or combination being out of the way, a dealer engaged in a private business, not affected with a public interest, and acting in good faith, might properly refuse to sell, except in conjunction, such closely associated articles as ties and bagging.

Mr. Justice Brandeis dissented on the ground, among other things, that there was no suggestion made in the proceeding before the Trade Commission that the complaint was defective and that no such objection was raised in the Circuit Court of Appeals, nor indeed in the Supreme Court by counsel, and Mr. Justice Clarke concurred with him. They were also of opinion that the complaint was sufficient.

The discussion is an interesting one and of considerable importance, as under it it would seem to be the rule that no matter how fully the evidence before the Commission justifies its findings

and its order, any insufficiency in the complaint may be made the basis for vacating the order in the courts or refusing its enforcement. The statute seeks to make the findings of the Commission as to matter of fact conclusive, and it would certainly seem as if there were some plausibility in the suggestion that the question of the sufficiency of the complaint should be raised in some way, either before the Commission or in the court of first instance, as a condition of considering that question in the Supreme Court. The opinion of the court does not deal with that point and there may possibly be some misunderstanding upon it. On the other hand, there is great force in the position taken by the court that the order of the Commission, in a case where its findings of fact are conclusive on the court, should be based on the statement of a case sufficient in law to return the entry of the order made.

Mr. H. Thompson and Mrs. Claude R. Porter of Washington, with Mr. Alexander C. King of Atlanta, solicitor general, appeared for the Commission.

ESPIONAGE ACT

There were several cases decided at the last term discussing constitutional questions supposed to arise in criminal cases brought under the so-called Espionage Act of June 15, 1917, to which some reference ought to be made. The first of these cases to which we refer is Abrams v. United States, 40 Sup. Ct. Rep, 17. In this case it was held, Mr. Justice Clarke writing for the court, that the Act in question, as amended by the Act of May 16, 1918, was not unconstitutional as an entirety, as being incompatible with the first amendment to the Constitution, securing freedom of speech and of the press, and that acts of printing and disseminating, during the war, pamphlets containing disloyal, scurrilous and abusive language about the form of government of the United States and intended to incite, provoke and encourage resistance to the United States in the prosecution of the war, were not within the protection of the constitutional guarantee.

It would seem as if the evidence, as recited in the opinion, tended to sustain some, at least, of the charges in the indictment. That it did not was said to be the claim chiefly elaborated by counsel for the defendants. They were convicted in the court below and the Supreme Court, after reviewing the evidence, held that there was enough to sustain the verdict and that the court could not weigh conflicting testimony, but could only determine the question of law, as to its sufficiency, fairly to sustain the verdict.

Mr. Justice Holmes, Mr. Justice Brandeis concurring, dissented. He said that the Government might punish speech that produces, or intended to produce, crime against the United States and that the power undoubtedly was greater in time of war than in time of peace, because then dangers were present that did not exist at other times. He indicated that the intent to cripple or hinder the United States in the prosecution of the war was not sufficiently proved. He referred to the fact that sentences of twenty years imprisonment had been imposed, and said that "even if he were technically wrong and enough could be squeezed from these poor and puny anonymities to turn the color of legal litmus paper, the most nominal punishment was all that should have been inflicted, unless the defendants were to be made to suffer for their creed," and made some interesting observations on the theory upon which, under a sound, public policy, the greatest freedom of speech should be allowed; and in conclusion he regrets that he cannot put into more impressive words his belief that in the conviction of the defendants they were deprived of their rights under the Constitution of the United States.

It would appear, with great deference for this learned dissent and its author, as if he were much impressed with the insignificance of the defendants and their alleged criminal utterances and with the enormity of the punishment meted out to them. Certainly it does seem as if the courts of trial in the federal jurisdiction have, in some of these cases, acted with undue severity and as if they had overlooked the fact that no federal statute ought to be so construed and applied as to involve men, probably of but little intelligence and mental capacity in very grave and serious criminal responsibility, for having made fools of themselves by wild and extravagant utterances due to ignorance and to that sort of unstable temperament bordering often upon insanity, which marks so many undesirable aliens that have come to this country. With the law, however, as announced by the court, it is difficult to quarrel.

Another somewhat similar case is Pierce, et al v. United States, 40 Sup. Ct. Rep. 205. Mr. Justice Pitney delivered the elaborate and learned opinion in that case, reviewing the evidence with great fullness and also the law. It was held that the interpretation of a pamphlet distributed by the defendants, where the jury might fairly find that it would have a tendency to cause insubordination and disloyalty and amount to an obstruction of the recruiting and enlistment service, as well as its probable effect, were questions for the jury, and the court being of opinion that the evidence tended to establish the charges in the indictment, the conviction below should be sustained.

The same learned Justices dissented, Mr. Justice Brandeis writing the opinion in this case and Mr. Justice Holmes concurring. He based his dissent largely upon his view of the evidence that the court below had treated statement of matter of opinion rather as statement of fact, the falsity of which, in view of the nature of those statements, subjected the party circulating them to criminal visitation under the Act. He said that all the alleged false statements were an interpretation and discussion of public facts of public interest, and he reached the conclusion that the rulings complained of practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental. In conclusion he declared that the fundamental right of free men to strive for better conditions through new legislation and new institutions would not be preserved if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobedience of law, merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language.

It must be admitted that it is very difficult for

a patriotic American to read utterances set up in the opinion in this case with any patience for those who write them, or those who circulate them, and exceedingly difficult not to agree with the court that whether or not such utterances are calculated to discourage the efforts of our Government in the prosecution of war is fairly a question for the jury. If these great judicial debates shall have no further nor more important influence than in helping the profession and the people of our country generally to realize what a vital and essential part in the institutions of free government the trial by jury is in criminal cases, they will have accomplished much. It is indeed the great safeguard of all the essential right to life, to liberty and to property. This means, as Erskine well said, trial by court and jury, the court to decide the law and the jurors the facts.

The last case to which we refer is Schaefer, et al v. United States, 40 Sup. Ct. Rep. 259. The same general class of questions is presented in this case. The indictment seems to have been based on certain articles or editorials in newspapers published by the defendants in the German language and intended to be circulated among those who understood that language. The conviction was affirmed as to three defendants, and reversed as to two, on the ground that there was as to them no substantial evidence to sustain the conviction, they having been found guilty only on a conspiracy count in the indictment.

Mr. Justice McKenna discussed in a most interesting and judicial manner the nature of the right of free speech guaranteed by the Federal Constitution, and quoted with distinct approval, the dignified and fitting language of the charge of the court below to the jury, warning them of the importance of their duty to give the defendants a fair and impartial trial and to render a just verdict, and in considering the specific tendency of the articles attributed to the defendants convicted said that their tendency was that which the jury had attributed to them; that they, or some of them, in effect justified the German aggressions against this nation, and that there was no reason why the court should disturb the verdict of the jury except as to the two defendants indicated.

Mr. Justice Brandeis was of opinion that, tested by the rule laid down in the previous case of Schenck v. United States, 249 U. S. 47, the words complained of were not of such a nature as to create a clear and present danger that they would bring about the substantive evils that the Act of Congress was directed against. He recognized that, while the field in which the jury might exercise its judgment was a wide one, yet the court had its duty also which could not be abdicated, and expressed the opinion that no jury in calmness could reasonably say that any of the publications set forth in the indictment was of such a character or made under such circumstances as to create a clear and present danger that they would either obstruct recruiting or encourage the enemies of the United States, and in fortification of this vew the learned Justice quoted the articles at great length, concluding with a statement that convictions such as these, besides abridging freedom of speech, threatened freedom of thought and of belief.

Mr. Justice Holmes concurred in this opinion and Mr. Justice Clarke dissented in a separate opinion, holding that the statute was not violated by publishing reports and statements harmless in themselves and not shown to be false, merely because they had been published in a different form and in another paper, and expressing the opinion that this was the extent to which the proof of the case went as to the counts on which two of the defendants were convicted. In conclusion he said:

> I cannot see, as my associates seem to see, that the disposition of this case involves a great peril either to the maintenance of the law and order and governmental authority on the one hand, or to the freedom of the press on the other. To me it seems simply a case of flagrant mistrial, likely to result in disgrace and great injustice, probably in life imprisonment for two old men because this court hesitates to exercise the power which it undoubtedly possesses, to correct, in this calmer time, errors of law which would not have been committed but for the stress and strain of feeling prevailing in the early months of the late deplorable war.

SOLICITUDE FOR FREE SPEECH

No American lawyer can read these interesting discussions without being profoundly impressed with the solicitude exhibited by the members of the exalted tribunal where they were pronounced to preserve the great essential rights of free speech and of free press. I think it may be true also that those of us who read them carefully may have some lingering doubts whether the results in the court below were altogether consistent with that equal and impartial justice which the tribunals of the law are intended always to secure. It is impossible, as every lawyer experienced in jury trials understands, in times of great popular excitement altogether to exclude prejudice and passion from the jury box. But the corrective for this is not for an appellate tribunal to attempt the exercises of authority not within its power and jurisdiction. Much must be left to the judgment and discretion of the court of trial, and however in fact the power thus possessed may have been exercised, it must be presumed to have been exercised wisely and mercifully. A court of errors like the Supreme Court necessarily is bound by the ancient rule that a writ of error in a case at law searches the record for error of law only. There is great truth in the homely maxim that "hard cases make bad law." There is a great temptation to just-minded men, sitting in review of cases where upon the record the result shocks their sense of justice and humanity, to stretch the law in the effort to exercise the prerogative of mercy which, however, rests with another department of government. It is to be hoped that cases of this general character may hereafter be carefully examined in the executive department, and if, due to the excitement and perturbations incident to the war, it appears that unjust results have been reached, they may, so far as circumstances admit, be corrected by a wise, judicious and even merciful exercise of power vested in that department of the Government.

The plaintiffs in error in the case last referred to were represented by Mr. William A Gray of Philadelphia and other counsel.

PROHIBITION AMENDMENT

Among the cases decided by the court at the last term, none perhaps excited greater popular and professional interest than those dealing with the Eighteenth or Prohibition Amendment to the Federal Constitution and questions related thereto. We propose to refer to a group of those cases now,

the first of which, Hamilton, Collector v. Kentucky Distilleries Company, is reported in 40 Sup. Ct. Rep. 106. This dealt particular with the so-called war-time Prohibition Act approved November 21, 1918, after the armistice. The opinion was written by Mr. Justice Brandeis and there was no dissent. That Act provided that after June 30, 1919 until the conclusion of the war and until the termination of demobilization, the date of which should be proclaimed by the President, it should be unlawful to sell for beverage purposes any distilled spirits, and during that time no distilled spirits held in bond should be removed for beverage purposes except for export. It was held in that case that this Act was a valid and constitutional law; that while the United States lacked the police power reserved to the States, yet when it exerted any power conferred by the Constitution, it was no objection that such exercise might be attended by some incidents which attend the exercise by a State of its power of police; that the war power of the United States, like the police power of the State, was subject to such constitutional limitations as were applicable; that if restrictions on the use or disposition of property are such that the State under its police power could impose them consistently with the Fourteenth Amendment and without making compensation, the United States, in the exercise of its powers, might impose a like restriction and without compensation; that restrictions contained in the Act in question were admissible and imposed no obligation on the United States to make compensation to those unfavorably affected thereby; that the court could not say in advance of the conclusion of a treaty of peace, and in view of other indications that the political agencies of the Government were proceeding on the theory that the war was still on, that the Act in question had ceased to be valid; and that the Eighteenth Amendment did not repeal this Act, and that until the President proclaimed the termination of demobilization, the Act must be regarded as in effect.

The learned Justice, writing for the court, pointed out that the States had not been prohibited from legislating in a manner highly destructive of the property interests of the manufacturers of intoxicating liquor without making compensation by imposing many and severe restrictions in the way of prohibition statutes and otherwise; that measures of this character, adopted by State authority, had been sustained by the court; that it was unnecessary to determine whether an absolute prohibition of sale could be applied to liquor acquired before the enactment of the prohibitory law, and that the court could not say that seven months and nine days, being the period allowed by the Act in question, was not a reasonable time within which to dispose of all liquors in bond when the Act took effect.

The court recognized that a statute valid when enacted may cease to have validity owing to change of circumstances, but held that the court could not in this case declare that this Act, passed for the purposes indicated, had ceased to have force because the power of Congress to pass it as incident to its war powers ought to be regarded as having lapsed. The opinion is elaborate and well reasoned, and seems to be conclusive.

Among the counsel appearing for the Government was Mr. Solicitor General King of Atlanta, and among those appearing for the Distilleries were Mr. Levy Mayer of Chicago and Mr. William Marshall Bullitt of Louisville. Mr. Levi Cooke of Washington, with other counsel, appeared as amici curiae and general counsel to the National Association of Distilleries and wholesale dealers.

The next case to which we refer is United States v. Standard Brewery Company, and another case dealt with in the same opinion, 40 Sup. Ct. Rep. 139. The same Act is here under consideration. It was there held that under this Act indictments charging that defendant brewers unlawfully used certain grains in the manufacture and production of beer for beverage purposes, which contained as much as one-half of one percentum of alcohol, both by weight and volume, but failed to allege that that liquor was intoxicating, did not charge an offense and the court could not say as a matter of law that such liquor was intoxicating.

The opinion was written by Mr. Justice Day and is concise and convincing. Mr. Solicitor General appeared for the United States, and Mr. William L. Marbury of Baltimore and Mr. Elihu Root of New York for the defendants in error. The judgments below were affirmed.

In Ruppert v. Caffey another phase of the general subject matter is presented to the court, 40 Sup. Ct. Rep. 141. There the court had before it not only the so-called wartime Prohibition Act, but the Act generally referred to as the Volstead Act, passed over the President's veto October 28, 1919. That Act provided that the words beer, wine or other intoxicating malt liquors in the war Prohibition Act should be construed to mean any liquors which contained in excess of one-half of one percentum of alcohol. Thereupon Ruppert, a corporation and brewery owner, brought suit against the United States Attorney and Collector in the New York District, to enjoin the enforcement, as against the plaintiff, of the penalties provided in the war-time Prohibition Act as amended by the Volstead Act. The bill was dismissed below and brought by direct appeal to the Supreme Court. The plaintiff contended that he might legitimately show that in fact beer with an alcoholic content not greater than that contained in the beer plaintiff was making was not intoxicating. The Government contended that this was immaterial and that since the passage of the Volstead Act it was unlawful to manufacture or sell beer containing as much as one-half of one percentum of alcohol.

Mr. Justice Brandeis wrote the opinion of the court, and after a very elaborate and exhaustive treatment of the subject, with citation of a great number of cases from the State courts and full review of cases in the federal jurisdiction, held that plaintiff's argument was equivalent to saying that the war power of Congress, prohibiting the manufacture and sale of intoxicating liquors, did not extend to the adoption of such means to this end as in its judgment were necessary to the effective administration and enforcement of the law, and that a distinction should be made between power expressly granted to Congress by the Federal Constitution and such powers as arose by necessary implication and as incidents of such express and implied power. The court held this distinction to be without foundation in reason or authority, and said that while ours was a Government of enumerated

powers, it had the full attributes of sovereignty within the limits of those powers, and that since Congress had power to increase war efficiency by prohibiting the liquor traffic, no reason appeared why it should be denied the power to make its prohibition effective. The court also held that the plaintiff was not entitled to compensation for the restrictions imposed upon the use of his property, as there was in fact no appropriation of private property.

Mr. Justice McReynolds, Mr. Justice Day and Mr. Justice Van Devanter concurring, filed a dissenting opinion of great power, and Mr. Justice Clarke also dissented. Mr. Justice McReynolds, relying strongly upon Ex Parte Milligan 4 Wall. 2, held that whether or not there was a technical state of war, there was no emergency calling for the enactment under consideration and that the statute itself contained no declaration that prohibition of non-intoxicants was regarded as in any way essential to the proper conduct or conclusion of the war, or to the restoration of peace. He declared that, giving consideration to this state of facts, he could see no reasonable relationship between the war or the demobilization following, both of which, if not by formal announcement had in essence been terminated before the adoption of the statute and the restoration of peace, whose quiet had already descended upon us, and the destruction of the value of complainant's beverage, solemnly admitted in the record to be non-intoxicating and which it manufactured, held and desired to sell in strict compliance with the laws of New York. He also declared that well settled rights of the individual in harmless property and powers carefully reserved to the States ought not to be abridged or destroyed by mere argumentation based upon supposed analogies; that the Constitution should be interpreted, in view of the spirit which pervades it, with a steadfast purpose to give complete effect to every part according to its true intent, so that none should suffer emasculation by any strained or unnatural construction.

The inherent difficulty of the questions involved is well illustrated in the opinion in this case. That judges, like other men, should differ upon these elementary and radical questions is not unnatural; but it is a great thing in our system of government that we have an institution like the Supreme Court so strongly intrenched in the confidence, respect and regard of the people, so strongly supported and upheld by the loyalty of a great bar, that its conclusions when reached, even where the court is not unanimous, are finally and definitely accepted by the profession and by the country as settling the questions involved.

In this case Mr. Root and Mr. William D. Guthrie appeared for the appellant, the Brewing Company, and Mr. Solicitor General appeared for the Government with other counsel.

SOVEREIGN STATES LIQUOR CASES

The last case to be considered is perhaps the most important and far-reaching. In fact, a considerable group of cases were considered together, to which sovereign States were parties, applying to the original jurisdiction of the Supreme Court. They are reported under the title of Rhode Island v. Palmer, Attorney General, in 40 Sup. Ct. Rep. 486, and other appropriate titles.

In this case the conclusions of the court were announced by Mr. Justice Van Devanter in a manner rather unusual. The learned Justice first quoted Article 5, reserving the power to amend the Federal Constitution. He then quoted the text of the Eighteenth Amendment. He then stated that the court was concerned with seven cases involving the validity of that amendment, and of certain features of the National Prohibition Law known as the Volstead Act, 41 statutes at large, 305, which was adopted to enforce the amendment. He also stated that the relief sought in each case was an injunction against the execution of that Act; that the cases had been elaborately argued at the bar and in printed briefs; that those arguments had been attentively considered with the result that the court had reached and then announced the following conclusions on the questions involved. These conclusions were then stated as follows:

1. The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.

2. The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. Missouri Pacific Ry. Co. v. Kansas, 248 U. S. 276.

3. The referendum provisions of state Constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. Hawke v. Smith, 251 U. S., decided June 1, 1920.

4. The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article 5 of the Constitution.

5. That amendment, by lawful proposal and ratification, has become part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

6. The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by state Legislature, or by a territorial assembly, which authorizes or sanctions what the section prohibits.

7. The second section of the amendment—the one declaring, "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

8. The words "concurrent power," in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several

states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.

10. That power may be exerted against the disposal for beverage purposes of liquors manufactured before the amendment became effective just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.

11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title 2, par. 1), wherein liquors containing as much as one-half of 1 per cent of alcohol by volume and fit for use for beverage purposes are treated as within that power. Jacob Ruppert v. Caffey, 251 U. S. 264.

The learned Chief Justice, in a compact and lucid opinion, while concurring in the conclusions reached, gives his views upon the questions involved. He begins with an expression of profound regret that in a case of such magnitude, affecting, as it does, an amendment to the Constitution, dealing with the powers and duties of the national and State governments and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions without an exposition of the reasons by which they have been reached. He states that he appreciates the difficulties of the situation, but that it seemed to him the greater the perplexities, the more urgent was the duty devolved upon him to express the reasons leading him to the conclusions that the amendment accomplishes and was intended to accomplish the purposes now attributed to it in the provisions announced by the court and in which he concurred.

After a brief review of the various points made by the counsel, dealing particularly with the construction of Section 2, which confers upon Congress and the several States concurrent power to enforce this article or amendment by appropriate legislation, he reaches the conclusion that:

1. It does not require concurrent action by Congress and the States to enforce it, as this would result in declaring that the provisions of the second section avowedly enacted to provide means for carrying out the first must be so interpreted as to practically nullify the first.

2. He refers to the suggestion that the concurrent power given to Congress and to the States contemplates the possibility of action by Congress and by the several States and makes each action effective but that of Congress paramount. As to this he declares that he cannot accept this view because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers, and proceeds immediately by way of interpretation to destroy it by making one paramount over the other.

3. As to the suggestion that Congress is authorized to legislate on this subject within the field of Federal authority, and the States within the sphere of State power, he denies this because he says that then in a case where no State legislation was enacted there would be no prohibition, thus again frustrating the first section by a construction affixed to the second.

He says that looking comprehensively at all these conditions and the confusion and contradiction to which they lead, it cannot possibly be that Congress and the States entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or, if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated. He says that if the second section of the article did not exist no one would gainsay that the first section in and of itself granted the power and imposed the duty upon Congress to legislate to the end that by definition and sanction the amendment would become fully operative; that, therefore, the various contentions he has condemned cannot be sustained, because if they were, the second section would confer on the States the power to nullify the first section. He concludes his opinion with this language:

> Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the States power to do things which otherwise there would be no right to do. This being true, I submit that no reason exists for saying that a grant of concurrent power to Congress and the states to give effect to, that is, to carry out or enforce, the amendment as defined and sanctioned by Congress, should be interpreted to deprive Congress of the power to create, by definition and sanction, an enforceable amendment.

Mr. Justice McReynolds concurs as follows:

> I do not dissent from the disposition of these causes as ordered by the court, but confine my concurrence to that. It is impossible now to say with fair certainty what construction should be given to the Eighteenth Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances I prefer to remain free to consider these questions when they arrive.

Mr. Justice McKenna dissents. His position may be summed up in the following quotation from his opinion:

> From these premises the deduction seems inevitable that there must be united action between the states and Congress, or, at any rate, concordant and harmonious action; and will not such action promote better the purpose of the amendment—will it not bring to the enforcement of prohibition the power of the states and the power of Congress, make all the instrumentalities of the states, its courts and officers, agencies of the enforcement, as well as the instrumentalities of the United States, its court and officers, agencies of enforcement? Will it not bring to the states as well, or preserve to them, a partial autonomy, satisfying, if you will, their prejudices, or better say, their predilections? And it is not too much to say that our dual system of government is based upon them. And this predilection for self-government the Eighteenth Amendment regards and respects, and by doing so sacrifices nothing of, the policy of prohibition.

It would appear from this announcement by

the Court as if there were much that yet remained to be said upon the subject of this amendment and the method of its enforcement; but that one of the main contentions of counsel opposing the Government, that this amendment, being in derogation of the reserved rights of the State, was unwarranted by the Constitution, was not countenanced by any member of the Court, seems fairly apparent, nor could it well be otherwise.

The fifth conclusion announced by the Court expressly declares that the amendment, by lawful proposal and ratification, has become a part of the Constitution and must be respected and given effect the same as other provisions of that instrument. It is difficult to see how any other view could be plausibly maintained, except on the theory that the Constitution is a compact between the several States, not subject to modification in vital particulars affecting the relations of the State to the general government except by mutual consent of all parties to the compact. This theory has been so long abandoned and was supposed to be so completely destroyed by the logic of events, that it seems strange to see it revived in constitutional discussion at the present time.

It is, of course, not infrequently a matter of great difficulty to construe the judgments of courts of last resort when vindicated and elaborated in full and comprehensive judicial opinions. It is, therefore, not to be expected that this can be done to the general agreement of the profession, where the oracles of the law have spoken in the rather cryptic fashion pursued in this case.

The questions arising under Section 2 of the amendment cannot be altogether anticipated nor solved in the light of this decision. The conclusions announced by the Court seem to be directed rather to stating what this section, dealing with the concurrent power of Congress and the several States to enforce the amendment, does not do instead of what it does. Applied concretely, however, it would appear that the principles laid down by the Court and the opinion of the learned Chief Justice, would seem to indicate that Congress might constitutionally declare that liquors containing one-half per cent of alcohol or more were intoxicating, and that this having been done by the Act in question, then before the Court, the State could not, in the exercise of its supposed concurrent power by legislation, increase the permissible alcoholic content. On the other hand it would appear to be within the power of the State, accepting this definition of Congress, to legislate against the sale, or manufacture, or transportation of intoxicating liquors thus defined within the borders of the State and to thus provide for agencies for the detection of offences arising under the amendment and Congressional legislation, the apprehension of the offenders and possibly their punishment. It is, however, quite difficult to altogether grasp the distinction between the theory of the paramount power of Congress in this field, which seems to be, in a measure, rejected by the learned Chief Justice, and the theory that Congress having acted, the State accepting its action as final, may by appropriate legislation proceed to enforce the amendment, as really thus in a measure defined, and apply by Congressional legislation, although, as the learned Chief Justice declares, it may be that thus by the grant of concurrent power it was sought to unite national and state administrative agencies in giving effect to the amendment and the legislation of Congress enacted to make it completely operative. Evidently, however, some further exposition by this repository of final authority will be necessary before all the difficult questions that may arise under the somewhat peculiar language of this amendment may be regarded as fully solved

Mr. Herbert A. Rice of Providence appeared as consel for Rhode Island; Mr. Solicitor General for the Government; Mr. Levy Mayer of Chicago, Mr. Bullitt of Louisville, Mr. Root and Mr. Guthrie of New York, Mr. Charles A. Honts and Mr. John T. Fitzsimmons of St. Louis, Mr. Ralph W. Jackman of Madison, Wisconsin, and other counsel appeared for sundry parties. And in this and other like cases the Government was represented by other counsel also, connected with the Department of Justice.

INTERNATIONAL ASSOCIATION IN THE ORIENT

An "International Bar Association" was organized in Tokio during the latter part of March, 1920. It resulted from a meeting declared by the "Far East," a weekly newspaper published in that city, to have been "the most important international conference in Japan's history." Delegations from China, Batavia, Siam, the Philippines and Japan, as well as unofficial representatives of other nations, were present. It is stated that the intention is to make the new organization in no sense a strictly oriental affair but as broadly international as possible.

According to the "Far East," the new International Bar Association can do a great deal to allay the international friction constantly arising. Its influence on Japanese procedure, simply because it is international and will therefore obtain a more respectful hearing than the Japanese Bar Association, "in course of time may be incalculable." The idea of the organization's utility in international relations was also expressed by a member of the Japanese parliament who is at the same time a leading barrister of Tokio, Mr. Heikichi Ogawa, when he declared in an address that it was on the influence of such auxiliary organizations as this that the League of Nations would have to rely to a great extent for its effectiveness.

Among the other speakers were Dr. Baty, a representative of the English bar, who developed the idea of law as being at root the expression of the sense of justice common to every human mind; and Mr. Karel Pergler, representing "the youngest republic," who spoke chiefly of the newly formed state of Czecho-Slovakia.

The organization is said to be due largely to the efforts of Dr. Rokiuchiro Masujima, a distinguished Japanese jurist who was elected the first president. W. H. Piatt, of Kansas City, member of the American Bar Association, was invited by Dr. Masujima to be present and assist in the organization but was unable to attend. It is planned to have the next meeting in China. A meeting of the Japanese Bar Association, which was held in Tokio at the same time and in connection with the international movement, was largely attended.

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EXPLAINING OUR APPEARANCE

MEMBERS of the General Council and other officers of the Association who have been the recipients of appeals for co-operation in getting out this number of the Journal of the American Bar Association in a monthly form have already been advised of the proposed changes in the character and conduct of the publication. However, the great majority of the members will receive this number "out of a clear sky," as it were, and some explanation of the circumstances leading up to its issue appears to be demanded.

The Journal is issued in its present monthly form as a result of action taken by the executive committee at a meeting held in Chicago in April. At a previous meeting at Washington the question of making certain changes in the Journal was discussed, but decision was deferred. The resolution passed at Chicago approved certain changes in the character of the publication "to the end that it may be more attractive, more interesting to members of the Association and the Bar generally, and, if possible, a more powerful adjunct of the Association in respect of increasing the membership and interest in the Association." The preparation of a "dummy," giving as far as possible an exact idea of what the Journal should be, was authorized, and its submission to the executive committee for approval before further action was stipulated.

At that meeting the present editorial board was named, with the exception of Messrs. Herman Oliphant, of the University of Chicago, and R. E. Lee Saner, of Dallas, Tex. These gentlemen were named subsequently in pursuance of a resolution authorizing the President to appoint two other editors "upon the nomination of the Board." The management was delegated to Mr. James Keeley, formerly of the Chicago Tribune and the Chicago Herald.

Preparation of the "dummy" required some time. The new Journal had to be created, the method largely being to look over the entire field of legal publications and decide what features appeared best suited to aid in expanding the professional interest and usefulness of the Journal. The fact that it was the official publication of the Association and must not lose that character was of course kept in mind; in fact, was the point of departure for the plan. At last, after a few unavoidable delays, the "dummy" was completed and sent to the executive committee. It embraced substantially the departments and ideas represented in this number. The Association is indebted to Mr. Jarvis Hunt, of Chicago, one of the best known architects in the country, for the cover design. Certain liberties were, however, taken with the title, as originally designed, to conform to suggestions of some members of the executive committee.

Publication of the September issue in time for presentation to the meeting of the Association at St. Louis was then authorized by the executive committee. Contract for the issue was at once made, after inviting competitive bids, with a large Chicago printing house specializing in the publication of magazines. Organization of the best sources of information in the States available on emergency call was at once begun. Letters were sent to the members of the general council in each state for local matters of general interest to the profession, to the Secretaries of the State Bar Associations, and to the chairmen of sections. Independent sources for special articles for the non-departmental part of the Journal were also approached. The responses showed much interest in the plans and brought much material.

This brings the story of the first adventure of the American Bar Association in monthly journalism practically up to date. It is obvious that full success along the lines approved by the executive committee must be a matter of growth. The mere appearance of the magazine in this form naturally gives a more definite idea of what is suitable in the way of contributions to departments than any amount of statement. Both officials and members should, therefore, find it easy when they run across something suited to the Journal to file it away or send it in at once. With very little effort on the part of officials and members in the various states a monthly Journal can secure plenty of pertinent, profitable and current material. Development of the magazine in respect to professional interest and circulation would naturally mean a corresponding commercial development in a business way.

But success will not come by chance or without the cordial co-operation of our members. The active interest of the entire membership is most indispensable. If that is enlisted the magazine may be made a highly effective organ for the expression of Bar Association ideas and the furtherance of Association undertakings. It can become, in brief, in the nature of a monthly meeting of the Association attended by the entire membership and further encouraging that "cordial intercourse among the members of the American Bar" which the Association proclaims as one of its main purposes.

The plans of the Editorial Board must neces-

sarily be somewhat a matter of evolution. It is not at present intended to enter the field now so well filled by the old and well established law reviews and periodicals. It is anticipated that, as a rule, our leading articles will be of a rather less technical and more general character; and that the items of professional interest which we gather will be of a somewhat more personal character and more immediately related to the activities of the Association and kindred bodies and of our membership. On all these topics the Board will be glad to receive the suggestions of our members.

LAW REFORM

The discussions in Bar meetings as to law reform, particularly as to procedure, are sometimes rather amusing to a lawyer experienced in forensic controversy. They seem to proceed largely on the assumption that a lawsuit is a proceeding in which each party is animated by motives of the highest benevolence and the counsel are engaged in an amicable contest to see which one of them can most perfectly illustrate, in his conduct, the loftiest ideals and the most exacting standards.

This is not so and probably never will be. A lawsuit is a fight, each side eager to win, sometimes not altogether scrupulous as to how the victory is gained, often with large pecuniary results involved, sometimes the bitterest and most hostile feeling.

This always has been and probably always will be so. Quite possibly it is not desirable that conditions should be altogether changed; for when all has been said that can properly be said on both sides, the tribunal to decide is the better able to reach a correct conclusion.

But one thing the public and litigants have a right to expect; and that is that lawyers, judges and legislators shall so shape procedure as to have cases turn on the merits and not on some question of compliance with artificial rules for which they are largely responsible.

Now there are two things that ought to be done.

First—Rules of practice and procedure in all actions at law other than criminal prosecutions should be established here as in England by the Courts.

Second—The right of either party, subject to proper judicial control, to examine orally the other party fully, as to the subject matter of a cause of action or a defense, as it obtains in New York and many other states, should be established in the Federal Code and generally throughout the states.

The first reform would put the responsibility for technicalities aside from the merits on the Courts and lead gradually to their elimination.

The second would promote the settlement of a very large proportion of all cases before they ever came to trial.

Forms of pleading and similar matters, in view of the liberal provision for amendments now almost universal, are of far less importance. The Association has, through Shelton's Committee, done very valuable work to promote the reform first indicated. If once adopted in the Federal jurisdiction the states would follow. This would not at once inaugurate the millennium, nor obviate all the difficulties of litigation. But it would be a long step in the right direction.

A DOUBTFUL STEP

It has always been the claim of our profession that we met together not for the purpose of promoting the pecuniary interests of our members, but to advance the public interest, promote cordial and pleasant relations between lawyers, advance the cause of legal education and law reform, and to encourage and maintain high standards and sound ethical principles in the profession.

We notice now a tendency in a different direction. At least one State Bar Association, probably others, seems to be endeavoring to discover some method by which lawyers can get more money out of clients. Possibly some may regard the purpose as laudable; but we are inclined to think it not really a legitimate purpose for Bar Associations. In one Association a committee has recently reported a schedule of minimum charges which, we understand, was approved by the Association.

It may be doubted, perhaps, whether such a scheme is legal at common law; but quite irrespective of this there are important objections to it. Certainly it does not fall within the declaration of objects for which our Association was formed. It is desirable, no doubt, that lawyers should be properly and reasonably compensated for their services. But it would seem to involve a departure from the objects we profess in organizing and maintaining professional associations to devote them even in the least degree to this end.

There is inevitably too much of a tendency in practice to commercialize the profession. Let us not formally recognize and strive to promote this tendency in our Bar Associations.

WILLIAM C. NIBLACK

The death of W. C. Niblack of Chicago on May 6 last deprives the Association of one of its most active, loyal and reliable members. Mr. Niblack had only missed one of our annual meetings in the last ten years. He had served acceptably on various committees, including the Committee as to Government Liens on Real Estate, the Committee on Finance, and for three years the Executive Committee. At the time of his death, Mr. Niblack was chairman of the Section on Public Utilities. He was a man of fine abilities and great personal popularity with our members. The Executive Committee has adopted a memorial minute on his death, and when this is available it will be duly printed in the Journal.

Interesting anecdotes, instances of court room repartee, stories of queer cases, unusual happenings in court, unique phraseology in wills, deeds or other legal documents, in fact any little legal story tinged with wit or spiced with novelty, will be welcomed by the Journal. Address contributions to the temporary office, 1612 First National Bank Building, 38 S. Dearborn St., Chicago.

W. THOMAS KEMP

Secretary American Bar Association

Necrology

CHIEF JUSTICE WINSLOW OF WISCONSIN

THE death of John Bradley Winslow, Chief Justice of the Supreme Court of Wisconsin, terminates a long and useful judicial career.

The Chief Justice was born in the State of New York, but came with his parents to Wisconsin at an early age; there received his education and entered upon the practice of his profession. He was a judge of the first judicial circuit of that State for some seven years; then in 1891 he became a Justice of the Supreme Court of Wisconsin. He became Chief Justice in December, 1907, under the system obtaining in that State, by which the member of the Court oldest in service becomes Chief Justice and retains that position so long as he continues to serve.

To say that Chief Justice Winslow possessed all the qualifications of the ideal judge would be to ascribe to him that perfection which is humanly impossible. To say that he possessed them in a very high measure is to do him no more than justice. He was not one of those obstinate, unreasonable and unreasoning old creatures who sometimes seem, on the bench, to acquire a considerable reputation through the possession of these qualities. On the contrary, he was a man of singular serenity and equanimity of disposition, possessing in a very high degree what lawyers refer to as the judicial temperament, and with learning and attainments adequate to his high station; a just and fair-minded man who could see both sides of a question; a habit of lucid and clear thinking, and a temperate perspicuous and convincing style of considerable literary merit marked his judicial opinions. He was a most satisfactory and valuable judge. He was not unmindful of the ancient landmarks, yet recognized that our jurisprudence must not lag behind progress in other fields. He was, therefore, not necessarily hostile to new ideas, nor reactionary in his outlook upon our civilization and the wonderful changes which in his day have affected our social and economical life.

He was an upright man, who desired not so much to vindicate his own notions of the law, as to do that which was right and just and to stand for those principles of law which he believed contributed, broadly speaking, to the establishment and maintenance of ordered justice among men; of great courtesy and urbanity in his relations to his fellows on the bench and to the members of the bar. He never seemed to regard the latter as his inferiors, but as rather co-laborers with him in the temple of justice, consecrated to the same high duty of faithful ministry before her altars.

It is a singular fact that though he was always a Democrat, yet in a State having a normal Republican majority most of the time during his long service, of perhaps 100,000, he was never disturbed in his judicial tenure, but was several times reelected by a satisfactory and decisive majority.

This is largely due to the fact that for many years in Wisconsin the lawyers have taken an active part in nominating candidates for the Supreme Court, so that it has been quite usual for the political parties to dispense with conventions for this purpose and to leave the lawyers of the State to "call out" from among their number candidates that in their judgment were specially entitled to consideration for such high office. Therefore, politics has played a minor part in the selection of judges for the Supreme Court of that State; a fact which undoubtedly in no small measure explains the high position which that Court has always maintained among the Courts of last resort in the Central West.

His Court and his State have sustained a great loss in the death of Chief Justice Winslow, a most appropriate and singular recognition of which is found in the action of the Bar of the State shortly before his death and in the tributes which this event has evoked from the profession.

ARTHUR J. EDDY

THE American Bar lost one of its most brilliant, versatile and successful members in Mr. Eddy's death at New York, following an operation for appendicitis July 21st last.

He was born in Flint, Mich., where he began life as a newspaper man. He studied law at Harvard and was admitted to Illinois Bar in 1890, and thereafter practiced in Chicago, although he spent a great deal of time in recent years in New York and had a beautiful home at Pasadena in California. He wrote well and frequently on various topics covering a wide range. He was the author of a two-volume work on Trade Combinations, published in 1901. He published a much later work on the New Competition, which ran into several editions.

He was a member of leading clubs in New York, Chicago and Los Angeles; he was a pioneer with the bicycle when that humble vehicle was in high favor; was one of the earliest automobile owners in Chicago, having then owned cars of almost every known variety; was one of the best judges of wine in the country and one of the keenest and most appreciative of art critics, as well as one of the very best amateur fencers in North America.

He published several plays, one or two novels, various essays on art and Recollections of James McNeill Whistler. He traveled extensively in this country and Europe, and on the occasion of one of his trips abroad met Mr. Whistler and came to know intimately that brilliant, but erratic genius.

With it all he carried on a very large practice, so that at the time of his death, although this is a fact known to but very few, he had one of the largest professional incomes of any lawyer in the United States. He accumulated an ample estate through his own efforts and was especially identified with the law trade and industrial combinations.

He was a most brilliant raconteur and conversationalist, and was a welcome figure in the most cultivated social circles in the West and in the East. He was an original and vigorous thinker on public questions and advocated with much ability and plausibility compulsory subscription to Government Bonds on the part of every citizen in accordance with his ability. He contended that if the conscription of men for the defence of the nation was warranted by law, on the same principle the conscription of wealth to support and maintain such levies must be within constitutional and governmental competence.

He was a man of effervescing vitality and a certain youthful exuberance of feeling and fancy that seemed to defy the touch of time. Although he was sixty years old, he seemed much younger in spite of his white hair.

While Mr. Eddy pursued his own ends and did not permit himself to be diverted constantly to schemes in which others were interested and of which they were to be the beneficiaries, he was yet a loyal and devoted friend, misjudged possibly by some who knew him only slightly, but justly valued and esteemed by a large circle of intelligent and discriminating friends who knew him intimately and well.

A FABLE IN SLANG BY GEORGE ADE

"The Attenuated Attorney Who Rang in the Associate Counsel"

Illustrated by John T. McCutcheon

ONCE there was a sawed-off Attorney who had studied until he was Bleary around the Eyes and as lean as a Razor-Back. He knew the Law from Soup to Nuts, but much learning had put him a little bit to the Willies. And his Size was against him. He lacked Bellows.

He was an inconspicuous little Runt. When he stood up to Plead he came a trifle higher than the Chair. Of the 90 pounds he carried, about 45 were Gray Matter. He had Mental Merchandise to burn but no way of delivering it.

When there was a Rally or some other Gabfest on the Bills, the Committee never asked him to make an Address. The Committee wanted a Wind-Jammer who could move the Leaves on a Tree 200 Feet distant. The dried-up Lawyer could write Great Stuff that would charm a Bird out of a Tree, but he did not have the Tubes to enable him to Spout. When he got up to Talk, it was all he could do to hear himself. The Juries used to go to sleep on him. He needed a Megaphone. And he had about as much Personal Magnetism as an Undertaker's Assistant.

"Your honor," said Jim, "we are ready for trial."

The Runt lost many a Case because he could not Bark at the Jury and pound Holes in a Table. His Briefs had been greatly admired by the Supreme Court. Also it was known that he could draw up a copper-riveted Contract that would hold Water, but as a Pleader he was a Pickerel.

At one time he had an Important Suit on Hand, and he was Worried, for he was opposed by a couple of living Gas Engines who could rare up and down in front of a yap Jury for further Orders.

"I have the Law on my Side," said the Runt. "Now if I were only Six-Feet-Two with a sole-leather Thorax, I could swing the Verdict."

While he was repining, in came a Friend of his Youth, named Jim.

This Jim was a Book-Agent. He was as big as the Side of a House. He had a Voice that sounded as if it came up an Elevator Shaft. When he folded his Arms and looked Solemn, he was a colossal Picture of Power in Repose. He wore a Plug Hat and a large Black Coat. Nature intended him for the U. S. Senate, but used up all the Material early in the job and failed to stock the Brain Cavity.

Jim had always been at the Foot of the Class in School. At the age of 40 he spelled Sure with an Sh and sank in a Heap when he tried to add 8 and 7. But he was a tall Success as a Book Pedler, because he learned his Piece and the 218 pounds of Dignified Superiority did the Rest.

Wherever he went, he commanded Respect. He could go into a strange Hotel and sit down at the Breakfast Table and say: "Please pass the syrup" in a Tone that had all the majestic Significance of an Official Utterance. He would sit there in silent Meditation. Those who sized up that elephantine Form and noted the Gravity of his Countenance and the fluted Wrinkles on his high Brow, imagined that he was pondering on the Immortality of the Soul. As a matter of fact, Jim was wondering whether he would take Ham or Bacon with his Eggs.

Jim had the Bulk and the awe-inspiring Front. As long as he held to a Napoleonic Silence he could carry out the Bluff. Little Boys tip-toed when they came near him, and Maiden Ladies sighed for an introduction. Nothing but a Post-Mortem Examination would have shown Jim up in his True Light. The midget Lawyer looked up in Envy at his mastodonic Acquaintance and sighed.

"If I could combine my Intellect with your Horse-Power, I would be the largest Dandelion in the Legal Pasture," he said.

Then a Happy Idea struck him amidships.

"Jim, I want you to be my Associate Counsel," he said. "I understand, of course, that you do not know the difference between a Caveat and a Caviar Sandwich, but as long as you keep your Hair combed the way it is now and wear that Thoughtful Expression,

you're just as good as the whole Choate Family. I will introduce you as an Eminent Attorney from the East. I will guard the Law Points and you will sit there and Dismay the Opposition by looking Wise."

So when the Case came up for Trial, the Runt led the august Jim into the Court Room and introduced him as Associate Counsel. A Murmur of Admiration ran throughout the Assemblage when Jim showed his Commanding Figure, a Law Book under his Arm and a look of Heavy Responsibility on his Face. Old Atlas, who carries the Globe on his Shoulders, did not seem to be in it with this grand and gloomy Stranger.

For two hours Jim had been rehearsing his Speech. He arose.

"Your Honor," he began.

At the Sound of that Voice, a scared Silence fell upon the Court Room. It was like the Lower Octave of a Pipe Organ.

"Your Honor," said Jim, "we are ready for Trial."

The musical Rumble filled the Spacious Room and went echoing into the Corridors. The Sound beat out through the Open Windows and checked Traffic in the Street. It sang through the Telegraph Wires and lifted every drooping Flag.

The Jurors turned Pale and began to quiver. Opposing Counsel were as white as a Sheet. Their mute and frightened Faces seemed to ask, "What are we up against?"

Jim sat down and the Trial got under way. Whenever Jim got his Cue he arose and said, "Your Honor and Gentlemen of the Jury, I quite agree with my learned Colleague."

Then he would relapse and throw on a Socrates Frown and the Other Side would go all to Pieces. Every time Jim cleared his Throat, you could hear a Pin drop. There was no getting away from the dominating Influence of the Master Mind.

The Jury was out only 10 minutes. When the Verdict was rendered, the Runt, who had provided everything except the Air Pressure, was nearly trampled under foot in the general Rush to Congratulate the distinguished Attorney from the East. The Little Man gathered up his Books and did the customary Slink, while the False Alarm stood in awful Silence and permitted the Judge and others to shake him by the Hand.

Moral: An Associate Counsel should weigh at least 200 Pounds.

THE KANSAS INDUSTRIAL COURT ACT

By W. E. Stanley, Wichita, Kan.

IN the late fall of 1919 a coal strike in Kansas resulted in a shortage of fuel throughout the State. The State took over the mines and operated them. While this relieved somewhat the need for fuel, it brought home very forcibly to the people of the State the necessity of effecting some arrangement whereby the public, dependent for the necessities of life upon any given industry or industries, could not be deprived of them through the action of any small group, either employers or employees.

The direct result of this was the calling of the special session of the Legislature by Gov. Henry J. Allen, and the passage of the law generally known as the "Kansas Industrial Court Act." Since that time there has been much general discussion throughout the country as to what this act was.

It should be stated at the outset that, in a strict sense, the body thus created is not a court, since it has no power to enforce its own orders except through the medium of the regular established courts. Neither is it an arbitration board, since it is an attempt to do away with arbitration and give to those who may have a grievance in industrial matters the right to make their complaint, secure an investigation and have an order issued which will protect their infringed rights or effect a satisfactory solution; and it also gives the State a right to assume the proper control of both sides of any industry affected with a public interest. It is an attempt to give a judicial solution to industrial difficulties and the question of whether or not that has been accomplished by the Legislature still remains for the courts to determine.

The act itself—Chapter 29, Laws of Kansas, 1920—is known as an act creating a Court of Industrial Relations, defining its powers and duties relating thereto, abolishing the Public Utilities Commission, repealing all acts or parts of acts in conflict therewith and providing penalties for violation of the Act.

The Court consists of three judges appointed by the Governor of the State, holding office for three years, their terms expiring each successive year, and the oldest in term of office being the presiding judge.

The jurisdiction of the Court covers that held by the Public Utilities Commission to supervise and control the public utilities and common carriers as defined in Sec. 8329 and 8330, Gen. Statutes of Kansas, 1915, doing business in the State of Kansas; and all the authority formerly granted to the Public Utilities Commission was, under this law, conferred upon the Court of Industrial Relations.

In addition to this power, the Court is given jurisdiction over all those employments held to be affected with a public interest and thereby subject to supervision by the State. These are specified as follows:

1. The manufacture or preparation of food products, whereby substances are being converted into a condition to be used as food.
2. The manufacture of clothing and the matter of wearing apparel.
3. The mining or production of any substance or material in common use as fuel.
4. The jurisdiction of all food products, articles entering into wearing apparel or fuel, from the place where it is produced to the place of manufacture or consumption.
5. And all public utilities, and any firm, person or corporation within the capacity of owner, officer or worker is subject to the provisions of the act.

The Court is likewise given full power to supervise, direct and control the operation of the industries, employments, public utilities and com-

mon carriers specified in the act, in so far as necessary or needful for the proper and expeditious enforcement of all of the provisions of the act.

In such respect it may adopt all reasonable and proper rules and regulations to govern its proceedings, the service of process, to administer oaths, and for the regulation of the manner of its investigations, inspections and hearings.

The act provides that for the sake of public peace, health and the general welfare of the people of the State, said industries, public utilities, employments and common carriers, shall be operated with reasonable continuity and efficiency in order that the people of the State may live in peace and security, and be supplied with the necessaries of life. And that no person, firm, corporation, or association of persons shall in any manner, or to any extent, wilfully hinder, delay or suspend such continuous and efficient operation for the purposes of evading the provisions of the act; nor shall they do any act or neglect to perform any duty enjoined by the act for the same reason.

The Court is further granted the power to hear and determine all controversies between employers and workers or between groups of workers, engaged in any of the industries above mentioned. This is done in most cases upon the complaint of either party to such controversy or upon the complaint of any ten tax payers of the community in which the industries, etc., are located, or upon complaint of the Attorney General, if it appears that the parties are unable to agree and that the controversy may endanger the operation of any of the industries mentioned. But the Court has likewise power, upon its own initiative, in case it appears that a controversy may endanger the continuity or efficiency of the service of any of the specified industries or produce industrial strife, disorder or waste, or threaten the public peace, to summon the parties necessary to the proper investigation and to make temporary findings and orders necessary to protect the status of the parties properly in interest pending the full and complete investigation. Upon such complaints having been made to the Court, investigations may be held and, after the conclusion of such hearings, the Court makes and serves upon all interested parties its findings, setting specifically the terms and conditions upon which said industry, etc., should be thereafter conducted with reference to the matters determined by the Court.

If in such investigations the Court finds it necessary to make any changes therein, either in the conduct of the industry, employment, utility or common carrier, in the matters of working and living conditions, hours of labor, rules and practices, wages or standard of wages, it has the power to make such orders and such changes, subject to the provision that all such terms, conditions and wages shall be just and reasonable and such as to enable the industry to continue with reasonable efficiency to produce or transport its products or continue its operations. Any such changes as set out in the orders of the Court shall continue for such time as may be fixed by the Court, or until changed by agreement of the parties, with the approval of the Court; and any such orders are subject to modification on proper application.

The act declares that "it is necessary for the promotion of the general welfare that workers engaged in any of the said industries, employments, utilities or common carriers, shall receive at all times a fair wage and have healthful and moral surroundings while engaged in such labor; and that capital invested therein shall receive at all times a fair rate of return to the owners thereof. The right of every person to make his own choice of employment and to make and carry out fair, just and reasonable contracts and agreements of employment is recognized. If, during the continuance of any such employment, the terms or conditions of any such contract or agreement hereafter entered into, are by said Court, in any action or proceeding properly before it under the provisions of this Act, found to be unfair, unjust or unreasonable, the Court of Industrial Relations may by proper order so modify the terms and conditions thereof that they will be and remain fair, just and reasonable, and all such orders shall be enforced as the act provides.

The Court is given power to select its own employees and has the power and authority to issue summons and subpœnas and compel the attendance of witnesses and parties thereto, and in case of the failure of any person so subpœnaed to attend the Court, it is authorized to take proper proceedings in any Court of competent jurisdiction to compel obedience to such summons or subpœna.

In case of the refusal of any party or parties to obey any order issued by the Court, it is authorized to bring proper proceedings in the Supreme Court to compel compliance therewith; and the Act further gives the right to appeal to the Supreme Court on the part of any party to such order, to compel the Court of Industrial Relations to make and enter a just and reasonable order in the case.

The law recognizes the right of collective bargaining and provides that individual members of unincorporated unions, or associations who desire to avail themselves of such right of collective bargaining, shall appoint in writing some officer or officers to act as their agents or trustees, with authority to enter into such collective bargains and to represent all of the individuals in all matters relating thereto.

The following act or acts are by the Court made unlawful:

a. For any person, firm or corporation to discharge any employee because he brings complaint or testifies before the Court.

b. For any two or more persons, by conspiring or confederating together, to injure in any manner any other person or persons or corporations, etc., by boycott, by discrimination, by picketing, by advertising, by propaganda, etc.

c. For any firm, person or corporation engaged in the specified industries to limit or cease operations for the purpose of limiting production or transportation or to affect prices for the purpose of avoiding any of the provisions of the Act.

d. For anyone under the provisions of the Act to fail to do an act or order or do any act forbidden by the Court.

e. For any individual, employer, or other person to conspire with others to quit employment, or to induce other persons to quit their employment for the purpose of hindering, delaying or suspending operations of any of the specified industries, or for any person to engage in inducing or intimidating by threats or in any other manner any

persons to quit their employment, though it is recognized that nothing in the act shall be construed as restricting the right of any individual employee engaged in the specified industries to quit his employment at any time.

For any individual violating the provisions of the act there is a penalty of a fine of $1,000 or imprisonment in the County Jail for one year, or both fine and imprisonment. While for any officer of any corporation or officer of any labor union or association of employers who violates the provisions of the act, or who shall use his authority to enforce others to violate the same, a fine of $5,000 or imprisonment in the State penitentiary for two years, or both fine and imprisonment is specified.

It is further provided that in case of the suspension, or cessation, of operations of any of the specified industries, when it appears that the same is affecting the public welfare, the Court is empowered to take proper proceedings in any Court of competent jurisdiction of the State to take over, control, direct and operate the said industry during such emergency, and that a fair return and compensation shall be paid to both the owners and employees engaged in such industry.

Up to date the Court has made several adjustments of wage disputes, and in some instances the raise in wages granted to the employees has been followed by a corresponding raise in rates granted the public utility, to cover such increased cost, but as yet only two cases have come before the Supreme Court for decision.

In the first case, No. 22959, filed June 12, 1920, entitled Clay County Co-Operative Association vs. Southwestern Bell Telephone Company et al, the only point really applying to the act was whether an appeal to the Supreme Court could be taken as provided by Section 12, and whether the law creating the Public Utilities Commission was in force with reference to appeals from matters involving the public utilities. In the opinion of the Court, the Court of Industrial Relations Act gives that Court authority over two classes; the regulation of public utilities and the regulation of industrial relations. On the Public Utility side, the Court is simply the successor of the Public Utilities Commission and orders made in the field of public utilities are to be reviewed as before according to the Public Utilities Act; which would make it appear that the Court had two different fields of activity and that the procedure in each field was provided for under two different laws.

The second case, which is more important and has a more direct bearing upon the act, is the case numbered 23013 filed July 19, 1920, entitled the State of Kansas v. Alexander Howatt et al. This case arose out of the complaint of miners who were members of labor unions, of which the defendants were officers. The Court of Industrial Relations, as a result of the complaints, started an investigation directed to working conditions in the coal mines, with reference to hours of labor, provisions for safety, sanitary conditions, miners' incomes, plans of mines as to continuity of operation and production, future, supply, cost, etc. Howatt and the other defendants were subpœnaed before the Court to testify, but they failed to appear and an order was issued from the District Court requiring them to appear and testify. As they refused to obey this order they were committed to jail for contempt and from this order they appealed.

In their appeal the constitutionality of the Industrial Court act was brought into question, but the Court in its opinion held that such question could not possibly be before the Court on this appeal, inasmuch as the defendants in their character of witnesses, whose attendance before the Court was sought in order to give information concerning the subject of investigation, have no standing to question the validity of any provision of the statute other than those directly involved, since they could suffer no possible injury therefrom in these proceedings; and until the provisions of the act were attacked by some one competent to question their validity—by some one whose rights in respect of the subject matter of the litigation are injuriously affected by them—any expressions of the Court relative thereto would be mere dictum. The Court did hold that the provisions of the act that, in case of the refusal of any person to obey a subpœna issued by the Industrial Court, it can take proper proceedings in any Court of competent jurisdiction to compel compliance therewith, and further authorizing the District Court to make an order for the appearance of such person before the Industrial Court and committing him for contempt in case of his refusal, are not open to any constitutional objection on the ground that such action of the District Court would be nonjudicial.

The complete syllabus prepared by the Court is as follows:

1. The legislature may create an administrative body and empower it to investigate conditions existing in the mining industry, make findings, and reports, and establish rules with reference to the operation thereof designed among other purposes to promote the health and safety of employees and the continuity of production, so long as the regulations are reasonable and not upon some special ground obnoxious to constitutional provisions.

2. In view of the provision of the statute creating the Court of Industrial Relations that if any part thereof shall be held to be invalid, it shall be conclusively presumed that the legislature would have passed the act without it, any portions thereof which are not objectionable in themselves must be enforced, regardless of whether or not other portions may be open to constitutional objections.

3. The provisions of the statute creating the Court of Industrial Relations authorizing that body to conduct investigations of the character indicated in the first paragraph of this syllabus are valid, and one who refuses obedience to an order of the District Court requiring him to appear as a witness in such investigation cannot be heard, in a proceeding against him for contempt on account thereof, to question the validity of other portions of the act because of constitutional guarantee which are not invaded by the requirement made of him.

4. The finding that the defendants disobeyed the order of the District Court is held to have been warranted.

5. The provision of the act creating the Court of Industrial Relations that in case of the refusal of any person to obey a subpœna issued by that body, it may take proper proceedings in any court of competent jurisdiction to compel obedience thereto, authorizes the District Court to make an order for the appearance of such person before the

Industrial Court, and to commit him for contempt in case of his refusal. The provision is not open to constitutional objection on the ground that such action of the District Court would be nonjudicial.

6. The disobedience of an order to appear as a witness in such an investigation as that referred to in the first paragraph hereof cannot be justified on the ground that questions might be asked, the answers of which would tend to self-incrimination.

7. Under the provision of the constitution authorizing the legislature to be convened by proclamation on extraordinary occasions the governor is the final judge of the existence of conditions justifying the calling of a special session. (Farrelly v. Cole, 60 Kans. 356, 56 Pac. 492, followed.)

8. The act creating the Court of Industrial Relations is held not to be void by reason of any defect in the title; nor because it makes applicable to that body the laws previously relating to the public utilities commission nor, on the ground that it commingles in one body executive, legislative and judicial functions.

9. Various objections to the act are held not to be material in this proceeding.

10. Legislation by congress concerning the unlawful restraint of interstate commerce and control of fuel by the government during the war, and the appointment by the president of a commission to hear and determine matters of hours, wages and conditions in the mining industry, do not so fully occupy the field covered by the act creating the Court of Industrial Relations as to prevent that body from investigating conditions in the mining district of this state, making reports thereon and exerting some degree of regulation with reference thereto.

Such to date is the extent to which the Supreme Court of Kansas has given an interpretation of the act providing for the Court of Industrial Relations.

HON. FREDERICK EUGENE WADHAMS

Treasurer

American Bar Association

THE Association is hardly yet venerable in years. It was organized in August, 1878, and has had two treasurers. The first, Hon. Francis Rawle of Philadelphia, served until 1902, when, at the meeting in that year, he was elected to the Presidency. He is now practicing in his home city, of whose bar he has been an honored member for upwards of half a century. He was immediately succeeded by the present incumbent, Hon. Frederick Eugene Wadhams of Albany, who by successive elections has held the office since 1902.

Mr. Wadhams was born at Wadhams Mills, Essex County, New York, September 27, 1848.

He pursued his academic studies at Cornell University, taking his degree in law in 1876 at the celebrated Albany Law School and being admitted to the New York Bar in the same year. He has always practiced at Albany, a city famous for its great bar and its high culture.

In 1898 he married Miss Emma Louise Jones of that city.

For over twenty years he has been Secretary of the State Bar Association of the Empire State and a vital and indispensable factor in all its numerous and useful activities.

He was Secretary of the board appointed to consolidate and revise the laws of his State, and in 1909 edited the result of this board's labors.

He also prepared a historical record of the general Statutes of the State and was appointed in 1913 a commissioner to prepare an exhaustive and comprehensive index of the session laws and statutes.

In all these capacities he has labored diligently, faithfully and intelligently with an undeviating purpose to meet, in the fullest measure, the duties and responsibilities thus involved.

In fact perhaps the most conspicuous trait of Mr. Wadhams' character is the signal fidelity with which he devotes himself to his work, never slighting it in any particular nor sparing himself in any way.

During the time that Mr. Rawle was treasurer, it became the custom for that officer to look after all the thousand and one details requiring attention in preparation for the annual meeting; and in large measure this has been true down to the present time. This does not mean the selection of speakers and making up a program so much as other multifarious details, without due attention to which no program, however well devised, and no meeting, however largely attended, can be successful.

No one not familiar with the patient, intelligent and painstaking methods of Mr. Wadhams in all this work can have any idea of the extent to which he has promoted the success of our meetings and the satisfaction which our members have derived in attending them; and so in 1908, on the occasion of our memorable trip to the Pacific Coast for the Seattle meeting, all the details of which were arranged by Mr. Wadhams in such a way as to contribute to its conspicuous success and the great comfort and convenience of our members who made the journey, those participating in it provided and presented to Mr. Wadhams, in token of their appreciation of his attention and efforts in this regard, a beautiful service of silver.

Notwithstanding the time bestowed by Mr. Wadhams on these public matters and the affairs of the two great professional associations with which he has been so closely and honorably identified for many years, he has diligently pursued the practice of his profession at Albany and maintained high rank at the Bar of that city as a lawyer of character and ability, of the most scrupulous integrity and the most honorable standards of professional conduct. He is probably known personally to a larger number of our members than any other member of the Association, and all appreciate and recognize fully our great obligations to him for his invaluable service.

We all realize how inevitably the great burden of the detail work, constantly increasing with the growth of the Association and its affiliated bodies, must necessarily, under our system, by which a President is elected for one year and never re-elected, fall upon the more permanent officers of the Association, and how admirably our treasurer has acted his part in this important and constantly broadening field.

Serus in coelum redeas.

HON. HAMPTON L. CARSON

President

American Bar Association

IT HAS seemed not inappropriate that the first number of the Journal in its present form should contain a brief sketch of our President, Hon. Hampton L. Carson of Philadelphia. Mr. Carson, however, has been a member for thirty years and has attended so many of our meetings and taken such an active and conspicuous part in our proceedings, that he is well known to those generally or even occasionally attending.

He was born February 21, 1852 in Philadelphia, a city famed for the eminence and high traditions of its Bar, where Binney, Rawle, and more recently the late John G. Johnson, ranked by many at the time of his death as very near the head of the American Bar, practiced their profession and adorned it with their great learning, eloquence and marked forensic abilities. Such an environment tends to develop those scholarly instincts which have been so well illustrated in Mr. Carson's professional career.

Taking his academic degree in Arts at the University of his native State in 1871, he graduated in law at the same institution in 1874 and later received, in merited recognition of the distinction of his career, the degree of Doctor of Laws, not only from his Alma Mater, but from La Fayette University and the Western University of Pennsylvania.

April 14, 1880 he married Anna Lea Baker.

He was an instructor in the law department of the University of Pennsylvania from 1895 to 1901. From 1903 to 1907 he was Attorney General of the State, discharging the duties of that important office with marked fidelity and signal ability. While he has had an extensive general practice, he is particularly known to the profession for his frequent and scholarly contributions to the literature of the law.

Some years ago he wrote an excellent work on the law of Criminal Conspiracy as deduced from the American decisions. He wrote also an acceptable History of the Celebration of the one-hundredth anniversary of the promulgation of the Federal Constitution; and a very popular and interesting History of the Supreme Court of the United States.

Moreover, he has made many eloquent and instructive addresses before Bar Associations and other learned bodies, and has been a frequent and valued contributor to legal journals and other periodicals.

He has the instincts of the scholar and the literateur, and at his charming home he has collected a remarkable library of rare and interesting books, prints and engravings, including, among other things, every edition of Blackstone's Commentaries ever printed, together with valuable manuscripts, letters and similar material such as only a man of genuine culture would care for or have sufficient intelligence and discrimination to gather, and such as is seldom found in a private collection.

Among the best of his earlier addresses is one entitled, "An Illustration of the Evolution of National Authority," read before the Illinois State Bar Association in 1901. After giving a most interesting and graphic history of Olmsted's case, Brightly's Rep. (Pa.) 1, and the facts out of which it arose, he paid this eloquent and deserved tribute to the Supreme Court:

> The establishment of the judicial system of the United States was the crowning marvel of the wonders wrought by the statesmanship of America. In truth the creation of the Supreme Court with its appellate powers was the greatest conception of the Constitution. It embodied the loftiest ideas of moral and legal power, and although its prototype existed in the Superior Courts established in the various States, yet the majestic proportions to which the structure was carried became sublime. No product of government, either here or elsewhere, has ever approached it in grandeur. Within its appropriate sphere it is absolute in authority. From its mandiates there is no appeal. Its decree is law. In dignity and moral influence it outranks all other judicial tribunals of the world. No court of either ancient or modern times was ever invested with such high perogatives.

One of his most recent addresses is that delivered before the Association on the timely theme "Heralds of a World Democracy" at the meeting in August, 1918 at Cleveland. Speaking of our entry into the war, he said:

> But if it could be imagined by the reptile philosophers of the Kaiser that a creed so vile as his, so maniacal, so fetid and so deadly could escape damnation in the eyes of God and man * * * if it even could be conjectured * * * that the United States of America would remain passive in these hours of cataclysmic agony, and stand a silent and impotent witness of the destruction of our inheritance, then would the hour have struck to call upon the Rocky Mountains and to flood of Niagara to cover our shame.
>
> In solemn and holy duty to ourselves and to our children, for the sake of humanity, in the fear of God, and in the love of freedom, we strike in defence of our altars and our shrines, in defence of our homes, our institutions, the graves of our ancestors, and the hopes of the future, and we will never cease to strike with all our strength until the powers of hell and darkness are vanquished by the powers of righteousness and light.

The orator here touched that high note of resolute and inflexible determination which animated every true-hearted American, and which made victory as inevitable as that after the night shall come the day.

The literature of the time furnishes no more virile and impressive appeal to the spirit of this unconquered and unconquerable people than these winged words.

An accomplished and experienced lawyer of wide attainments, both professional and general, of fine education and rare culture, Mr. Carson represents in a high degree those qualities which should attend upon genuine leadership at the American Bar, and it was the recognition of this fact that largely determined his selection for the presidency of the Association.

DEATH ENTERS THE JUDGMENT

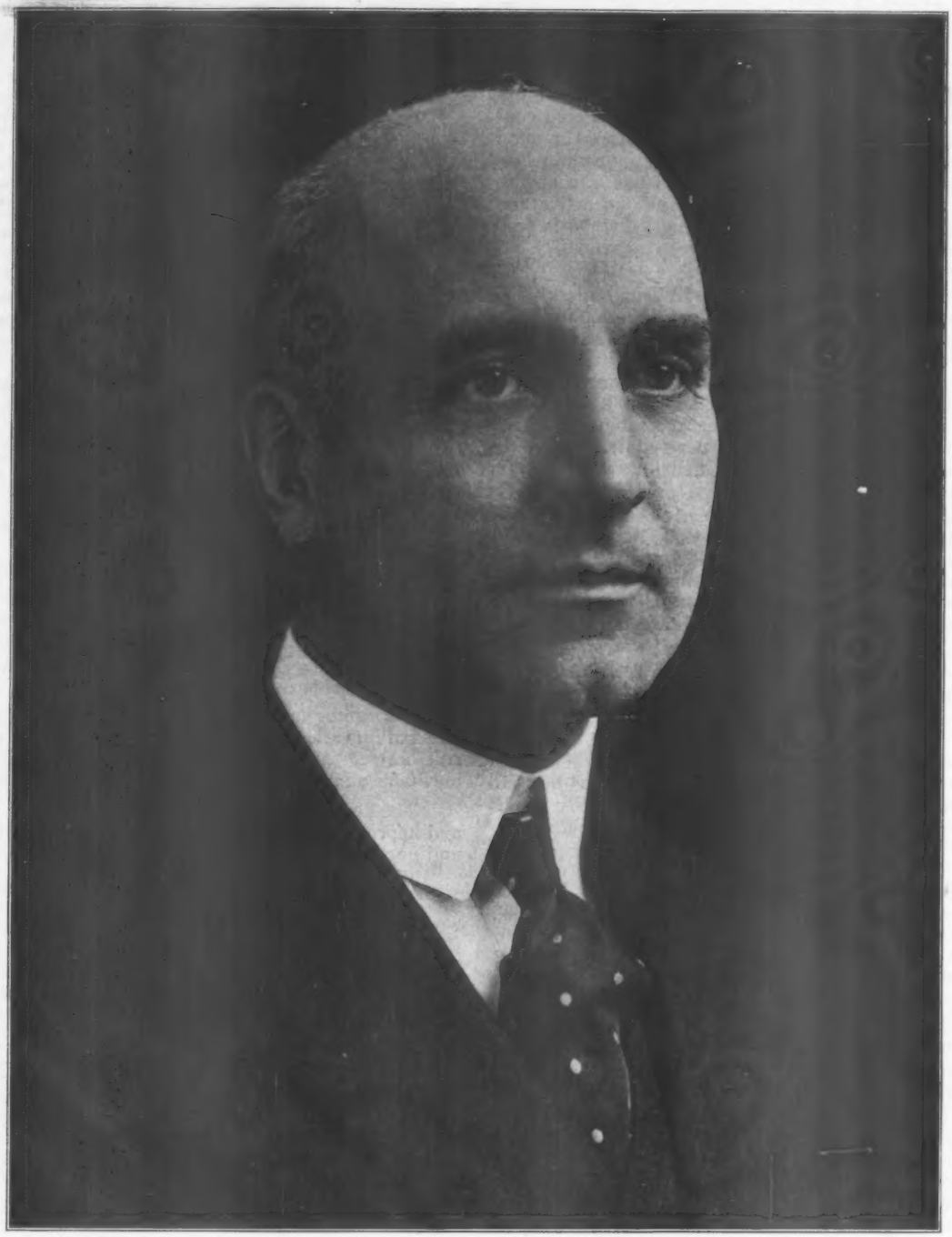
It is said that Solon said to Croesus, King of Lydia, in the height of his prosperity, that no man's life could be pronounced altogether happy until its close. This was so stated in a letter to the Society of Solicitors, written by John Inglis, formerly Lord Justice General of Scotland, when the Society proposed to put his portrait on a window in their new library.

MR. ANONYMOUS IS CYNICAL

It is impossible for a man now to get rich by getting what he earns. He must get a considerable part of what other people earn in order to accomplish this.—*Anonymous.*

EVEN OF DAYLIGHT SAVING TIME?

The test of a really great man is whether he is in advance of his time.—*Brougham.*



JUDGE CARROLL T. BOND

Chairman Committee on Publications

NATIONAL PARTY PLATFORMS AND CANDIDATES

A Survey of the Points of Resemblance and the Points of Divergence in the Documents Adopted at Chicago and San Francisco

PARTY platforms are generally considered from the standpoint of differences. The exigencies of party warfare, for one thing, require the emphasis of issues. But the platforms are not less interesting and important from the standpoint of resemblances. For these resemblances largely represent, according to the best judgment of observing politicians, the subjects on which the nation is substantially agreed. There is, for instance, significance in the fact that both platforms come out against the right to strike against the government. "We deny the right to strike against the government," says the Republican platform. "With respect to government service," says the Democratic plank, "we hold distinctly that the rights of the people are paramount to the right to strike." There is certainly no issue here.

Another significant point of resemblance is the demand of both platforms for some form of an association of nations that will minimize the danger and frequency of wars. The controversy indeed threatens to rage as to the kind of concert among nations that this shall be. The Democratic platform calls it a "league" and reaffirms the administration position: the treaty as written, at least with "no reservations which would impair its essential integrity," but, if deemed desirable, with reservations "making clearer or more specific the obligations of the United States to the League Associates." In other words, "interpretative reservations." The Republican platform calls it an "agreement among the nations to preserve the peace of the world," an "international association," and declares that the covenant signed by the President at Paris is inacceptable as containing stipulations "not only intolerable for independent people but certain to produce the injustice, hostility and controversies among nations which it proposes to prevent." The agreement which it advocates is one for an international association to preserve peace based on international justice and providing methods "which shall maintain the rule of public right by the development of law and the decision of impartial courts, and which shall secure instant and general international conference whenever peace shall be threatened."

But beyond and above these issues of detail and methods stands the fact that both political parties have furnished platform evidence that they interpret public sentiment as favoring some genuinely constructive effort in that direction. Such an effort may lay more stress on the sanctions behind the decision on questions involving international peace—the force that is to put it into effect—than on the methods and principles to rule in reaching conclusions. On the other hand, it may stress the judicial methods of reaching conclusions and the development of ruling principles at the expense, to some extent at least, of the promptness and unity of the enforcing power. Or it may completely reconcile these two tendencies and strike a medium happy for the world. Whatever the ultimate form the concert is to assume, both parties unite in undertaking to do something in that direction.

Both platforms decry "compulsory arbitration" in private industry, the Democratic announcing that it is opposed to it, while the Republican states that "we do not advocate" it. Which means that, in spite of the manifold loss and inconvenience caused by fairly recent coal strikes and other disturbances, neither set of party experts believes the time has come when public opinion sufficiently demands that the law step in and forbid them in private industries. These planks were, of course, sufficiently presaged by the elimination of compulsory arbitration features from railroad legislation. Both parties are naturally for better methods of adjustment and conciliation in this field and both recognize "collective bargaining" as a proper means of settling controversies. The Democratic platform, however, goes slightly beyond the Republican statement in specifically affirming the right of labor, as well as capital, to speak "through representatives of their own selection." This phrase is no mere inadvertency, as one will perceive who recalls the controversies in recent industrial conferences over the right of labor to choose to be represented by spokesmen outside the industry affected by the dispute.

Both platforms are for a national budget, reflecting a general public demand for greater method, economy and efficiency in national estimates and appropriations. The Republican platform congratulates the country on the passage of a bill for "an executive budget" and condemns the President for his veto thereof. The Democratic platform declares for a budget system that shall reach the legislative as well as the executive end of government. Its plan is to provide that the budget as such shall not be increased except by a two-thirds vote of congress," each house, however, being free to exercise its constitutional privilege of making appropriations through independent bills." It defends the Presidential veto on the ground that the bill was defaced by constitutional objections and considerations of patronage. There can be no doubt that, in spite of the difficulties of making our constitutional system adjust itself to the complete budget system known in England, for instance, we are on the eve of a substantial reform in that direction at Washington.

When it comes to enfranchised woman, it is not a fight but a footrace to see which can first reach the woman voter and lay at her feet a bouquet breathing incense. With an enthusiasm heretofore not discernible in their platforms, both parties demand the independent naturalization of married women and provision for the retention of American citizenship by an American woman marrying an alien resident. Both prefer their special claims to consideration. Declarations on the subject of women in industry in both platforms further emphasize the similarity of methods of the rival suitors.

To turn to certain differences: The Republican platform declares roundly that the high cost of living is primarily due to currency inflation due to Democratic financing, although it specifies other familiar causes as contributing thereto. The Democratic platform, on the other hand, holds the war and post-war governmental financing one of the party's big achievements. It maintains that the increased living cost is due primarily to the war itself, to necessary governmental expenditures for destructive purposes, to private extravagance, inflation of foreign currencies and

credits and conscienceless profiteering. Neither platform specifically mentions a soldier bonus, though the Republican platform leaves the door slightly open while the Democratic platform slightly closes it, if we interpret the phraseology correctly.

The tariff issue, on whom the gods have apparently bestowed the gift of eternal youth in spite of scientific tariff commission plans and the like, reappears, tariff for revenue scowling across the bloody chasm of the "eighties" and "nineties" at a protective tariff. However, present conditions keep it from occupying the center of the stage.

The Republican platform pledges itself to a "consistent, firm and effective policy towards Mexico that shall enforce respect for the American flag," while the Democratic plank is less menacing in tone and affirms a certain progress towards stability and safety in that country. On the liquor question the Democratic platform is silent, while the Republican platform declares for the enforcement of the "constitution of the United States as it shall be declared by the Supreme Court." This pronouncement, however, does not touch the burning question, now agitating some bosoms, of whether the Volstead act may not be "liberalized," under the constitution and the Supreme Court decision, by a new congressional definition of the alcoholic content that shall constitute an intoxicating beverage.

The Republican platform declares strongly against government ownership and operation or employe operation of railroads, while the language of the Democratic platform, while asserting the superior effectiveness of government war-time operation, favors "a thoroughly effective transportation system under private ownership, without government subsidy at the expense of the taxpayers of the country."

When we come to the candidates of the two great parties certain resemblances strike one as strongly as certain differences. Both Senator Harding and Gov. Cox are from the same state, that "mother of Presidents," whose fecundity shows no abatement with the passing years, the shift of population and the changing drift of politics. Both have had what is generally regarded as a typically American career: starting from modest beginnings in the country, acquiring a fair education from available school facilities and a much better one in the school of experience, and finally arriving at success by dint of intelligence, optimism and industry. Both worked as printer's devils and both attained the goal of newspaper ambition and became editors, a position from which the transition to politics is as facile as the descent of Avernus.

Here it is worth while to note particularly the evident determination of fate to redress, at least partially, a certain lack of professional balance in the list of Presidents. This is particularly interesting to lawyers, who have heretofore had the lion's portion of presidential honors. Fate this year decided there should be an editor for President. After nominating Harding, it made assurance doubly sure by nominating Cox. Thus the danger of a repetition of the collapse of editorial hopes for that high position in the Greeley campaign is avoided. There have been soldiers, lawyers, judges, authors, even an engineer and surveyor as presidents, but never before an editor. Now, by the sardonic humor of fortune, a gentleman belonging to a profession which specializes in criticism to a great extent is to learn how it feels to be the object of such forms of literary activity.

Just as both presidential candidates come from the Middle West, both vice-presidential candidates come from the East. Both presidential candidates are editors, both vice-presidential candidates are lawyers. Both presidential candidates received their education in schools far from renowned, while their running mates received theirs in old and famous institutions of learning in the East. Gov. Coolidge has various honorary degrees from eastern universities. Mr. Roosevelt has served as a member of the board of overseers of Harvard. When we consider the familiar and homely elements in the careers of the presidential candidates, which their campaign managers and press agents will assuredly not cease to dwell on, we almost feel we are back in the good old log cabin and hard cider campaign days, when the sentiments and virtues of the average man received their political apotheosis. When the vice-presidential candidates are considered, we are in an atmosphere with something of the Roosevelt tian tradition of a combination of politics and academic culture.

SECRETARY OF THE ASSOCIATION

Mr. W. Thomas Kemp, our Secretary, like all his predecessors, is a Marylander. He was born in Talbot County in that state on April 16, 1877. He acquired his academic education at St. John's College, Annapolis, where he took his A. B. degree in 1897, and Columbia University, New York, where he graduated from the School of Political Science with an A. M. in 1899. His professional studies were completed in the Law School of the same institution in 1900, when he received his L. L. B. degree. In the same year he was admitted to the Bar in New York and in Maryland.

He began practice in Baltimore thereafter and has been in active practice both in the state and federal Courts for twenty years. In 1909 he became a member of the well-known firm of Whitelock Deming & Kemp, of which his lamented predecessor as our Secretary was the senior. In 1910 he was made assistant secretary and served in that capacity until the death of Mr. Whitelock, when he was selected by the executive company to succeed him as Secretary.

From 1916 to 1920 he was Chairman of the Conservation Committee of Maryland; and in 1919 he was President of the Eastern Shore Society of Baltimore City.

June 4th, 1904, Mr. Kemp married Elsie Marvin of Annapolis. They have two children, W. Thomas, Junior, and Louise H. Kemp.

Mr. Kemp has a large acquaintance in Baltimore both in and outside of the profession. He is highly esteemed there on account of his upright character, professional abilities and agreeable and popular disposition. As assistant secretary for the last ten years a large part of the detail work of the office has fallen upon him. To all of this he has devoted himself with great assiduity and fidelity, and thus, as well as by his amiability and uniform courtesy, has merited and earned the friendship and esteem of a large and constantly increasing circle in our membership.

In the prime of life, of excellent professional abilities and high character and standards, he has every prospect of a long, useful and honorable career in his chosen profession.

"CIVILIZATION AND LIBERTY"*

By Judge George T. Page

U. S. Circuit Court of Appeals, Seventh District, Chicago

IN all the world of words, the two at the head of this paper, more, perhaps than any others, stand for democracy.

Civilization is the Constitution of democracy and Liberty is its Bill of Rights.

There can be no democracy without civilization. Neither can there be a democracy where the people do not have liberty. Collectively and individually we in America believe in democracy, and claim that our government is a democracy; that is, that the supreme power and the divine right to govern are not in some king, but are in and to be exercised by the people.

In fact, all the civilized peoples of the world, no matter by what name their particular scheme of government is called, and struggling for and toward some sort of democracy.

When our parent colonies tore themselves loose from England by the seven hard years of the Revolutionary War, they did it because the things which they had fled from Europe to escape had pursued them into this country and had made conditions so unbearable that the bitter cold, and hunger and rags, and death itself in the American army of freedom seemed preferable.

When that freedom from the old world domination and tyranny of taxation without representation was won, Washington and Hamilton and Madison and the other delegates, set out to write a constitution and institute a democratic form of government, for the purpose of making secure to all the people those rights which Hancock and Adams and Franklin and Jefferson and their associates had written into the Declaration of Independence as unalienable,—"Life, Liberty and the pursuit of Happiness."

These things are the very fundamentals of our civil life; and yet how many people know anything about the quality or the quantity of civilizing that a man must have to fit him to be one of the people who rule? What man is there among us who is willing to so limit his own desires that he can write a single definition of liberty that he will say shall be the controlling rule of conduct and civil association not only for himself and his friends, but also for those who differ with him, and for the stranger?

It is because the lives of men and the history of day-by-day events show that men either know little about the course and growth of a civilization, and little about the true meaning of Liberty, or else that they are willing to ignore the warnings of even visible danger signals, that I want to talk to you about Civilization and Liberty, not scientifically and abstrusely, but as close-up, intimate, every-day matters that must be known to and understood by every man and every woman, too, who belongs to the ruling class, —the people,—if our democracy shall survive to us and our children.

Addresses on occasions like this are valuable, chiefly because they may start some new line of thought, which ripens into action by the hearer.

The consequences that flow from the unwise conduct of ignorant men are no worse than the consequences that flow from the conduct of those who know better but who purposely or carelessly do a wrong; but the processes that must be gone through to work a correction are quite different. The first must have his *knowledge* improved, and the latter must have his *moral standards* corrected. Unfortunately the world just now is confronted by serious conditions that are the product of a combination in many instances of ignorance and conscious wrongdoing.

While we are inclined to charge up all our present embarrassments to those responsible for the late war, yet this is an erroneous process that must not be indulged; and if we do not know the real cause of our troubles we shall never find our way to work an efficacious cure. In any field of healing the man, who, by diagnosis, is able to discover the cause and seat of the ailment must go before the man who applies the remedy. The war may have hastened results, because the weakening or breaking up of the old established order caused by the necessity of waging war on an unheard-of scale, gave opportunity for the crystallization of forces long in the making and opposed to government in almost every country. Some governments were strong enough to resist; others went by the board. A socialistic government was established in Germany, and the so-called bolshevist government in Russia; and through the outcroppings during the war and the activities in our own country following the revolutions abroad, we have come to a realization of the fact that we have taken into the national body an indigestible and irritating mass of foreign matter.

I have not the time and it is not my purpose to discuss the Russian soviets or the so-called People's Councils; but just as food for thought for those who believe that we ought to have something of that sort in America, it may be noted in passing what John Spargo said in the May "Harper's." He showed that placing factories and other means of production under the control of the soviets was followed by utter inefficiency and demoralization through inattention and incompetency. This resulted in turning the industries over to managers and giving them dictatorial powers, and finally the nationalization of industry. Strikes were declared to be treason against the state and were suppressed with all its power. A leading social-democrat, reporting to his fellows in Germany, said that soviet government no longer existed in Russia; that capitalism had been reintroduced in Russia. A Bolshevist organ published the statement that in a town of less than 140,000 inhabitants 41,000 persons were employed in administrative departments alone, while nearly 20,000 more were connected with various public service commissions, etc. These conspicuous failures of a kind of government which some among us seem to think would be a fine experiment for America led Spargo to say:

> As one of the millions who have seen in Socialism the hope of a larger individualism, I frankly admit that I would rather be hungry in any capitalistic nation I know of than to be ever so well fed in such a servile Utopia.

Reports from an American newspaper's foreign service go farther and say more damning things:

> The Russian revolution in the hands of Lenin and Trotsky has fastened upon the Russian people a new tyranny, which is not restoring the Russian

*Annual Address before the Texas Bar Association, read at its annual meeting at El Paso, July 2, 1920.

> energies but sapping them, * * * and which has maintained itself by the cruelties and oppressions of a ruthless minority. No private liberties which western capitalistic democracies have set up have been respected under the dictatorship of the proletariat; neither free speech, free press, nor free assembly.

A foreign correspondent of the Chicago Tribune, who wrote the above, said to Emma Goldman, deported by the United States to Russia, speaking of the Russian government, "It is rotten," to which she replied:

> You are right, it is rotten, but it is what we should have expected. We always knew the Marxian theory was impossible, a breeder of tyranny.

The above statements and conclusions lead one to suspect that the following humorous quotation from a New York paper may contain quite as much of fact as of humor:

> A correspondent of the New York Sun quotes a Russian as declaring: "In our Russia there is no religion, no czar, no money, no property, no commerce, no happiness, no safety, only freedom."

So far as possible we should keep informed as to civil and political conditions everywhere in the world, but I am today chiefly concerned about conditions within our own borders,—our civilization and our liberties.

If I believed in the total depravity of man, I would believe that all civilization is artificial; but I do not believe in either proposition.

I believe that at the very bottom of the brain power in man to think, to reason, to do things and to direct the course of life, there is, as a necessary part of that power, the capacity to appreciate the moral quality of truth. Civilization is but the growth of man's knowledge of the truths of nature. "Know the truth and the truth shall make you free," is only a short way of saying, "Know the truth and thereby you will become civilized, and by becoming civilized you will be free."

Our liberties must increase with the improvement of civilization. If we neglect our duty to civilization we endanger our liberties.

These statements seem commonplace, and I would not have the temerity to recall them to your attention if it were not for the fact that most men who use the word "Liberty" seem to have no conception of any relation between it and "Civilization" and no realization of the fact that our "jungle" definition of it must be much restricted.

I saw carried down one of the great thoroughfares of Chicago, during the crowded hour, and by a young woman, a banner upon which were printed in big bold type the words, "There is no liberty in America." She was not promulgating the foolish idea of a single ignorant brain, but seemed to be one of a numerous band of women presenting a variety of banners, each bearing some criticism of our government. If I had not seen this with my own eyes I would not have believed that any woman or any body of women could have any such belief,—in the face of the fact that the limitations upon the rights of women and the disabilities under which they have lived for centuries, and to which they are still subject in many countries, have been almost wholly swept away under the freedom of our Constitution and our flag. But the fact that women think that way, and the fact that there are many similarly foolish notions that are influencing the conduct and utterances of many people within our borders,—some of them our own citizens and some of them not,—makes it proper for us to find out whether our civilization is the thing the fathers planned for us, and whether our liberties are in any way impaired or even endangered.

The fact that there are people who have lost confidence in our government need neither discourage nor alarm us. The fact that some believe, or at least affect to believe, that all our democracy is gone, and our liberties have been taken from us, that our scheme of government is a failure, and that some half tried and wholly experimental scheme from beyond the seas is worthy of trial here, should be recognized and studied but not feared. No good red-blooded American should be afraid of anything but himself. No timid person, who knows the history of his country, will see anything in any existing condition that cannot be corrected and overcome by a little of that courage, a little of that devotion to duty that have always characterized the American people and knit them together as a unit—both in peace and in war—when confronted by any great issue. Our people have seldom been of one mind on any great question; but in almost all cases the spirit of give and take, the spirit of compromise,—a truly American spirit—has actuated and controlled the deliberations of men and brought them to sane and safe conclusions.

Whoever knows the history of our national constitution in the making knows that it was the product of concessions and compromise on every hand, and that there were many difficult gaps that it was thought never could be either closed or bridged,—and we gained therefrom the greatest and best instrument for the protection of human rights known to the world.

But a fine Declaration of Independence and a Constitution did not necessarily make a strong government, and many discouraging things confronted our new government.

In 1793, when Genet, the new ambassador from France, came to this country, he started in to influence our people against their own government, which led Hamilton to say:

> We too have our disorganizers. But I trust there is enough of virtue and good sense in the people of America to baffle every attempt against their prosperity, though masked under a spacious pretense of an extraordinary zeal for liberty.

There were then men trying to discountenance and set at naught the power and authority of government, and it is not worse now.

There are only four real difficulties confronting us: The first is that love of money which is the root of all evil; second, our great cities; third, the great number of aliens, who know nothing of our standards and care nothing about our institutions, and many of whom have become citizens without becoming Americans; fourth, indifference to and ignorance of the great body of our people as to the burdens and responsibilities that rest upon every individual in a country where the individual is the source of government itself.

We have heard much used in recent months the word "Americanization."

Webster defines Americanize as—to render American. Some one defined an American as "One who rules because he labors for the benefit of all."

What has happened to us in America that we must establish all sorts of Americanization schemes? Is it not in part because we have loved money more than we have loved America? Is it not because we have gone in for making money, every man Jack of us, and have left our Constitution and our flag, and our liberties, to shift for themselves?

Hark back to the land of the Pilgrim fathers on

the bleak Atlantic coast,—not enticed but driven there by the hard conditions in their homes beyond the sea. They were willing to pay and readily did pay any price for even a chance for freedom. Neither the bitter cold of a houseless winter, nor separation from home and friends, nor sickness on a barren and inhospitable coast, nor Indian massacres, nor any price, was too much for our forefathers to pay to escape the old conditions. And then oppression followed, and was visited upon them relentlessly. But they had learned that eternal vigilance was not only the price of liberty, but that eternal vigilance and eternal diligence were the price of food and clothing and life itself.

Those were the days when "Adam delved and Eve span." The Indians were not kindlier than the climate or the soil. At work, at play or at worship men lived with the rifle ever at their side. But they were yet to learn more. They learned that to their already too hard conditions there was to be added the bloody war, waged upon them by the parent country, that saw that to keep them it must break them,—break that spirit of self-reliance, that spirit of independence, that love of liberty, which was theirs because they had earned it,—bought not with gold, but with individual, self-reliant sacrifice and effort, by courage and endurance, in the face of every privation, discouragement and hardship to which men and women could be subjected.

The experiences of the fathers brought them to the writing of the Declaration of Independence, with the keenest sort of appreciation of their position and exactly what is meant when they wrote down their endowment as Life, Liberty and the Pursuit of Happiness, and they knew what it meant when they flung out to the world the then unacknowledged truth that to secure those rights governments deriving their just powers from the consent of the governed were established among them. They recognized, when Patrick Henry said, "The battle is not to the strong" that he referred to their small numbers and their illy equipped colonies as compared to the vastly greater numbers and power of the mother country. They recognized, without vanity but with a just pride, that he referred to them and to their life and experiences in the colonies when he said, "The battle is to the vigilant, the active and the brave," and when he concluded that ringing speech that I hope will be learned and understood by every school boy in this land, with the words:

> Is life so dear or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God. I know not what course others may take; but as for me, give me liberty or give me death.

When he had spoken those words the spirit of '76 was crystallized, the Declaration of Independence was written in the hearts of men, and the war for independence was won, before a gun was fired.

When the war was concluded, the Constitution written and adopted, and Washington elected, our democracy was instituted among men, by the consent of the governed, to secure to the fathers and their posterity the fundamentals of every society among men who are born equal, to establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of Liberty.

It hardly seems possible that with such a start, with such high purposes, we could in less than a century and a half be in danger of seeing Liberty and Justice superseded by money. I presume many will resent the very suggestion that such a change has taken place or is possible; but no amount of protestation will change the facts. Time will not permit me to trace the growth of business, and of the money power, through a long course of years.

Our foreign commerce was less than $50,000,000 in 1790, and did not reach $100,000,000 of exports or imports until 1801, and it was fifty years before either imports or exports reached $200,000,000. In the next fifty years the totals out and in were $2,200,000,000. In seventeen years therafter they had reached $10,300,000,000.

Our bank clearings for yesterday in New York were $1,077,293,617; in Chicago, $130,005,598. New York is the second city in the world and Chicago presses Paris hard for third place. Detroit, through making automobiles, has become the fourth city in the United States, having increased half a million, much more than 100 per cent in ten years. There is one automobile to every fourteen of our continental population, that has grown from less than 5,000,000 at the close of the Revolutionary War to over 110,000,000 now. To accommodate immense business, buildings from 20 to 25 stories high are common, and there is at least one over 50 stories high. Seventy-five miles per hour by rail is too slow for the mail of the business man, and it now travels by air.

We are all very proud of these things and the big money they represent. But where are we? Where are the things we had? No nation on earth ever had such a heritage of lake and stream, and forest and plain, of silver and gold and copper and coal, and iron. Where is that heritage gone? The public domain has gone almost without price to enrich individuals. The forests went at the same price, in the same way, and have been cut down, sawed into lumber, that men might build in feverish haste, not only to make greater cities, but to push the frontier swiftly on to the Pacific slope. It reached there long ago. Immense private fortunes have been made out of timber, the deposits of gold, and silver, and copper and lead, and oil, and coal. Our water power, our fisheries, have gone to make vast fortunes for individuals. The Nation, for the things it gave away and now needs, must pay the profiteer his price.

But I do not think those things represent the worst phase of the money madness of our generation. The question as to the relations between so-called capital and labor, which is largely one of money, is by far the most serious menace to our democratic institutions now confronting the American people.

When the settlements began to push back from the Atlantic coast and manufactures were first sold and then distributed, transactions spread over many months and over an extended territory, and our internal commerce had its birth, then it was that somebody had to furnish the necessary money to carry on these transactions and somebody had to do the work of manufacturing and somebody the work of the commerce or business end. There began to be separated the work of the head from the work of the hand. The head worker began to be known as the capitalist and the hand worker as the workman or laborer.

When we are studying what is likely to come out of Russia, where they are trying to throw away the head and use only the hand, it may be well to study conditions as they once existed in our own country,—when there was no commerce over an extended territory. Then every man was a workman; the boss, where there

was a boss, worked beside his men and did the same manual labor. In other words, men who labored with their hands made, owned and controlled the situation, and the so-called capitalist came into existence because changing conditions made it impossible to carry on manufacture and commerce on the new scale without the use of money, and without the aid of many men who did not work with their hands.

The Russian people will learn sometime, and the sooner the better for them and the world, that a society ruled by men's hands and not by their brains, is a foolish and an idle dream.

The antagonism between the men who worked and the men who owned was slow in developing.

But for years there has been avowed hostility between that which has come to be known as labor and that which has come to be known as capital.

The history of that antagonism is too long to be recounted here. It is enough to say that out of the struggle of a century there have grown vast organizations of labor, involving in their memberships millions of men; and these are offset and opposed by organizations among the employer groups.

Time and time again disputes between labor and capital have stopped the wheels in many industries, caused all concerned immense loss, and not infrequently destroyed either the business or the labor organization involved. In these disputes the public has never been considered; but has always been involved, either through danger, loss, inconvenience or deprivation, and oftentimes in all those ways.

These antagonisms have grown more frequent, more bitter, more dangerous, and more expensive, every year. It seems to me that by this time everybody should have reached certain conclusions:

First: That the relation between capital and labor is undemocratic and fundamentally wrong, because no considerable society can progress unless both work together with some reasonable co-operation.

Second, That no body of men have any right to precipitate and engage in civil strife, thereby disregarding not only law and order but also trespassing upon the rights of a great majority of the community, whose only immediate interest in the matter is in the inconvenience and injury thus inflicted.

Third: That persistence in the controversies between capital and labor are subversive of law and justice and destructive of our liberties under the law. Have not commerce and trade, and big business warped our vision and dwarfed our patriotism? Have we not endangered our liberties by adding desire to desire, and luxury to luxury, until we are necessarily become slaves to such extravagant notions? Is not the outrageous trend of prices, the abnormal wages, the enormous fortunes made from fuel and food and clothing and all the necessaries of life justification for the very general belief that we, whether workmen or capitalists, are become mere money grabbers?

Are we not confronted with the fact that millions gave up their homes and friends and went into foreign lands to fight, to suffer, to die if necessary for liberty, and that women gave up lives of comfort and ease to toil for and with those boys who went to fight, and all in the name of Liberty? And parallel with those facts is there not that other bald and shameless fact that thousands upon thousands became unconscionable profiteers? In these latter facts, namely, that there are by the millions those who are willing to sacrifice and serve and die for liberty, while there are at the same time those who are willing, seemingly, to destroy our liberties because of selfish greed for gain, is at once the hope and despair of every student of government.

But love of liberty is in my opinion far stronger than the love of money, and when we can teach the people that these two cannot exist together, the men and women of America will emulate our forefathers, and not the young ruler who went away sorrowing because he was very rich.

Our great cities, and the many aliens who know nothing of our standards and the indifference of vast numbers of our people towards their public rights and responsibilities are so bound up together, in their influences upon our civilization, and our liberties, that they may in a general way be treated together. The increase of population in the cities has far outrun the increase in the country districts.

A list of nineteen cities in the United States shows that they contain nearly 19,000,000 people, over one-sixth of the total population of the United States. The smallest city listed has over 314,000 inhabitants. The largest city, New York, has 5,600,000 and has gained 854,000 population in ten years. Chicago has 2,700,000 and has gained over 500,000 in ten years. Philadelphia, 1,800,000, has gained 274,000. Los Angeles, 575,000, has gained 256,000 in ten years. Detroit, Michigan, with a little less than a million, has gained over 500,000 in ten years.

It can be easily seen that, at this ratio of gain, it is quite probable that 50 per cent of the population within the next fifty years will be in a few large cities.

I have not the figures upon the foreign-born population of the various cities. In 1910, 2,748,000 in New York were rated as foreigners, 600,000 over ten years of age were unable to speak English, and 360,000 were illiterate.

Chicago statistics seem to show that about one-third of the population are American born, of American parents; another one-third had either one or both parents who were foreign born; the other third was foreign born.

It is not unusual in our cities to find large groups where the inhabitants are all of one nationality. In cities like Chicago and New York there are many thousands, forming groups, or communities, who have no knowledge of the English language. What the President said in his Philadelphia speech in 1915, viz., that "America does not consist of groups. The man who thinks of himself as belonging to a particular national group in America has not yet become an American. A man who goes among you to trade upon his nationality is no worthy son to live under the Stars and Stripes," is literally true, except the first part of it. There are groups in the cities,—uneducated, un-Americanized groups, who not only do not understand anything about American institutions but do not understand the English language, and breaking up those groups would be a long and strenuous undertaking, but they will never become thoroughly Americanized until they are broken up.

A bad feature about such a condition of things is that those who come from various European countries where the English language is not spoken are really not accessible to Americanization efforts, but are easily accessible to those who read and speak their language and who many times have ideas and purposes wholly foreign to our form of government and no

knowledge about our scheme of civilization or our scheme of a constitutional democracy, where justice shall be done to every man and where the liberties of every man shall be protected. There are other ways in which the standard of citizenship is brought down, where there are large aggregations of people.

The basis for the best civilization and the highest degree of liberty must have its foundation in the home. For a large percentage of the people of every great city, the family life and the home life is wholly impossible. In every city of any considerable size there are continual accessions to the ranks of those who are not able to remain self-supporting and who become wholly or in part dependent upon charity; and this percentage, it is said, very frequently amounts to 10 or 15 per cent of the population, and sometimes as high as 25 per cent. People who are not self-supporting do not make good citizens, no matter how fine their ideas may be nor how high their purposes, because they are subjected repeatedly to many repelling influences which they cannot resist.

People who do not speak our language, people who do not read and write our language, people who come here and who do learn to read and write but who do not make any study of our institutions or desire to understand and bring themselves into harmony with them, the people who are in one way or another the objects of charity, do not, any of them, count for anything in the betterment of our civilization or the protection of our liberties.

In addition to these, there are in large cities bodies of men and women, who, while they escape the necessity of charity, are wholly absorbed trying to keep pace with the rush of things about them, so much so that they have neither time, opportunity nor desire to become public spirited or to have any vision of a better democracy among men. As they come in contact with government it is represented by the word "politician" or by some one a little higher in authority but with no greater moral purpose, and all such contact breeds discontent and dissatisfaction and opens the minds of all such to every influence adverse to our government.

If we had the time to analyze the constituent elements of large cities, and of large aggregations in cities of men whose education, training and experience have been under governments wholly different from ours, and under conditions where liberty and justice mean not things to which they have a right but which they only share in because somebody is willing to give them something, it could be easily demonstrated, as history has shown, that the great dangers to established government are in cities, and the greatest danger of all is from those elements in cities where the government is least understood. Those who do not understand the government and those who range all the way from the barely successful to those degraded by poverty, are often the first which, if unstayed will grow into general discontent and to be affected by discontent ultimately mean the overthrow of the government, unless conditions among them can be changed. It will not do for you, from whom the very large cities of the country are far removed, to feel that you do not have any intimate relation with or interest in the great cities or their problems. My conception of the dangers and difficulties in the great cities is, I think, warranted, because the serious problems which confront us as a people and as a government will be largely determined in their settlement by what happens in such cities. Then what happens in such communities is of vital importance to every one of us because there most of the problems are developed, there the dangers are greatest, and no section of the country can escape the consequences of what is there done. These great concentrated populations are the bearing points of our civilization and our governmental system.

Our interest in all these things is that no fundamental error in any scheme of government, no fundamental wrong anywhere in the world to the rights of men, is so far removed that its consequences will not ultimately reach and affect our community, if its progress is not checked, and likewise fundamental wrongs in our community life must ultimately reach and affect others. In a democracy every man and every woman is to some extent a ruler, that is, the source of power of the government is in them, and what they do affects not only them but everybody who comes within the range of their influence.

I think that we should enlarge upon the slogan, "America for Americans," and add to it "Americans Everywhere for America." If we are to have a higher and a better civilization, if justice is to prevail among men, if our liberties are to be secure, every man in America must know and feel what his duty is, and, in the language of Lord Nelson, adapted to this situation, know that America expects every man to do his duty. Let us all strive to appreciate the great responsibilities as well as the privileges of citizenship and with high courage and loyal and patriotic purpose dedicate ourselves to the faithful discharge of the great tasks thus involved. Let each and all remember that through the old-fashioned virtues of courage, patriotism and, when necessary, the spirit of sacrifice, our fathers, building wiser than they knew, laid the foundations broad and deep for the mighty structure under whose ample canopy their children and children's children have dwelt and multiplied and prospered and developed into this mighty Republic, blessed as no people in history have ever been; and that all this is a sacred heritage which it is our high duty to preserve and transmit, unimpaired and undiminished in all its integrity and excellence, to the generations yet to come.

INVENTION OF GREAT MEN

The fact that in all the professions there is one first favorite means no more than the fact that there is only one editor of the London Times. It is not the man who is singular, but the position. The public imagination demands a best man everywhere, and if nature does not supply him, the public invents him. The art of humbug is the art of getting invented in this way. For example, there died a short time ago a barrister who once acquired extraordinary celebrity as an Old Bailey advocate, especially in murder cases. When he was at his zenith I read all his most famous defenses and can certify that he always missed the strong point in his client's case and the weak one in the case for the prosecution, and was in short the most homicidally incompetent impostor that ever bullied a witness or made a moving but useless appeal to a jury. Fortunately for him, the murderers were too stupid to see this; besides, their imaginations were powerfully impressed with the number of clients of his who were hanged, so they always engaged him and added to his fame by getting hanged themselves in due course.—*Fortnightly Review.*

ACTIVITIES OF STATE BAR ASSOCIATIONS

Secretaries of State Bar Associations are requested to send in news of their organizations. "News" means not only official statements of time, place and programs of regular meetings and the action there taken but also reports of other interesting activities. In brief, anything showing what the membership, committees and leaders in the State Bar Association are thinking and doing with respect to matters of professional interest. Secretaries can help to make this department one of the most interesting in the Journal. The collection of reports will enable each State Bar Association to see every month what the others are doing and to avail itself of any suggestion contained in their activities. Contributions should be mailed not later than the 5th of each month and should be addressed to the temporary office, 1636 First National Bank Building, Chicago.

COLORADO

THE program for the meeting of the Colorado Bar Association, at Colorado Springs Aug. 20 and 21, included addresses by Gov. Henry C. Allen of Kansas, U. S. Senator Charles S. Thomas of Colorado, Judge N. Walter Dixon and others, and involved such topics as "The Industrial Court of Kansas," "Right of a Railroad to Recover from the Federal Government for Damages Received During the Period of Government Regulation," and "Power of Congress to Make Peace."

On Colorado Day, Aug. 2, at the Governor's office, in the Capitol, the Denver Bar Association tendered a farewell reception to Judge Ebenezer T. Wells, who is retiring from the office of Supreme Court Reporter, and is about to remove to California to reside the remainder of his days. Chief Justice James E. Garrigues, of the State Supreme Court, presided. Besides Judge Wells, the speakers were Judge Wilbur F. Stone, Casimero Barella, T. J. O'Donnell and Senator Charles S. Thomas.

Judge Wells was born at Richland, New York, May 15th, 1835. He had a distinguished military career, was severely wounded, and was breveted Major, Lieutenant-Colonel and Colonel for gallantry. He came to Colorado in 1865; was a member of the Territorial Legislature, Associate Justice of the Territorial Supreme Court, Compiler of the Revised Statutes of 1868, member of the Constitutional Convention, and, on the admission of the State, he was elected a Justice of the Supreme Court, from which he resigned after a short term. He has been Supreme Court Reporter since 1909.

The Colorado Pioneers' Association, The Loyal Legion and Beta Theta Pi were especially invited guests of the Bar Association on the occasion.

In his address at the reception Judge Wilbur F. Stone, a former Justice of the Supreme Court, Judge of the U. S. Court of Private Land Claims during its existence and now, at the age of 87, U. S. Commissioner in Denver, said this of law-enforcement in early days in Colorado:

"I came to Colorado in 1860. There was no general organized authority in what afterwards became the territory and is now the state of Colorado for two years thereafter. Each community enacted and executed its own laws through courts which owed no allegiance to, and held no credentials from, any other source. I practiced in those Courts. Better laws were never made. Law was never more generally enforced and those communities, as a rule, were as peaceable and law abiding as the Commonwealth of Massachusetts. Stories of the wild and wooly, lawless West, then depicted in dime novels and still perpetuated in the movies, were and are mere figments of the imagination of those who make a living by playing on the credulity and sentiment of people further East."

INDIANA

The twenty-fourth annual meeting of the Indiana State Bar Association was held at the Country Club, Indianapolis, Ind., on July 7-8. The annual address was delivered by The Hon. Evan A. Evans, of Baraboo, Wisconsin, Judge of the United States Court of Appeals for the Seventh Circuit, who took as his subject "The Naturalizing and the Nationalizing of the Alien," and in the course of which he discussed the rising tide of immigration, and the dangers connected with it, and the means which should be used to safeguard and protect our institutions.

The President's address was delivered by the President Oscar H. Montgomery; subject "The Good of the Order."

Papers were read by Roscoe A. Heavilin on "Organization of the Bar," Henry H. Hornbrook on the "Tichborne Case," and Wilmer T. Fox, on "Business Methods in a Lawyer's Office." The Association served a dinner on July 7 and a luncheon on July 8 to the members and their guests in attendance.

There was a large attendance of the members and their wives, and the meeting was one of the most successful in the history of the Association.

The following officers were elected for the ensuing year: President, Elmer E. Stevenson, Indianapolis, Ind.; Vice-President, Charles M. McCabe, of Crawfordsville, Ind.; Secretary, George H. Batchelor, Indianapolis; Treasurer, Elias D. Salsbury.

IOWA

The Iowa State Bar Association held its twenty-sixth consecutive annual meeting at Cedar Rapids, on June 24 and 25. The attendance at the meeting was approximately 350. The total membership of the Association is now over 1,100, which is probably more than 50% of the total number of lawyers in actual, active practice in the state. Perhaps more remarkable than this is the fact that, with the excepion of twenty-one names, which are unaccounted for, the dues of all members are paid up to date. It is doubtful if any other Association has a better record as to membership.

Important addresses were: "Courts of Conciliation" by Wm. R. Vance, until recently Dean of the Law School of the University of Minnesota, now of Yale University, and the annual address by Judge Harry Olson of Chicago on "The Organization and Procedure of Courts and the Intensive Study of Crime." Other papers or addresses were given by John N. Redmond of Cedar Rapids, B. F. Swisher

of Waterloo, Justice Truman S. Stevens of the Iowa Supreme Court and the President's address by Emmet Tinley of Council Bluffs.

The afternoon of the first day of the meeting was given up entirely to the discussion of certain matters which are to be presented by the Code Commission for adoption, as a part of the new Code which is to be passed on by the next General Assembly.

The Association recommended the adoption of three new uniform laws: The limited partnership act, the Conditional Sales act, and the Fraudulent Sales act.

At the banquet on Thursday evening, toasts were given by Judge Shelby Cullison of Harlan, Iowa; Judge Martin J. Wade of the Federal Court; The Hon. Jerry B. Sullivan of New York City; and Dean Wm. R. Vance of Minneapolis. At this banquet, Chas. E. Wheeler of Cedar Rapids told the story of the "Jones County Calf Case," one of the most delightful, most interesting and most remarkable cases in legal literature.

The officers elected for the ensuing year are: Chas. M. Dutcher, Iowa City, President; Jesse A. Miller, Des Moines, Vice-President; H. C. Horack, Iowa City, Secretary-Treasurer; A. J. Small, Des Moines, Librarian.

NEBRASKA

The Nebraska State Bar Association reports a canvass of the membership with reference to incorporation of the State Bar. At the last annual meeting it was directed that the draft of the proposal as submitted at that meeting be sent to every lawyer in the State, with a request that he submit his suggestions as to changes and amendments, after which the Special Committee appointed for the purpose should work up the changes and amendments into a re-draft, which should again be submitted soon enough to enable the members of the Bar to formulate ideas prior to the next annual meeting in December, 1920. The first draft was recently sent out.

The next meeting of the Association will be held in Lincoln in the latter part of December. Judge W. M. Morning, of the district bench of Lancaster County, is president, and has recently made application for membership in the American Bar Association.

NEW MEXICO

A special meeting of the New Mexico Bar Association was recently called to meet in joint session with the Texas State Bar Association, held at El Paso, July 1st, 2nd, and 3rd, at which time it was proposed to transact the annual business of the New Mexico Bar Association. However, on account of small attendance, the annual business was not transacted and the regular annual meeting of the New Mexico Association will be held some time during the fall, at time and place to be fixed in the near future.

The Lawyers Club of Albuquerque has adopted a unique plan for automatic election of officers. The constitution provides that at each annual meeting the name standing at the head of the roll of members shall be transferred to the foot and all other names thereon advanced one place. Thereupon, without any affirmative action on the part of the club, "the members whose names appear on the roll in the first group of five shall become and constitute the membership committee, of which the member whose name appears at the head of such group shall be the chairman." Following the same rule, the finance, library, house, scope and program committees are formed from succeeding groups. Committee chairmen form the executive committee, the chairman of the membership committee presiding over that body and being president of the club. The chairman of the scope and program committee becomes automatically the club secretary, and the chairman of the finance committee becomes treasurer. This automatic plan seems well calculated to avoid contests and to impose the official club burdens equitably on the membership.

NEW JERSEY

At the annual meeting of the New Jersey Association, held on June 11-12 at Atlantic City, the following delegates were appointed to attend the Conference of Bar Associations to be held in connection with the meeting of the American Bar Association at St. Louis: Walter H. Bacon, Bridgeton; Edward Q. Keasbey, Newark; Mark Sullivan, Jersey City. Alternates: Harvey F. Carr, Camden; Chauncey G. Parker, Newark; Maximilian T. Rosenberg, Jersey City.

Judge Buffington delivered an address on "The Legal Situation in Reference to Free Speech and Free Assemblage" on Saturday. At the banquet speeches were made by the Hon. Thomas G. Haight, former judge U. S. Circuit Court of Appeals; Judge Joseph Buffington, Justice Frank S. Katzenbach of the N. J. Sup. Ct.; Hon. Clarence E. Case, president of the N. J. senate, and Frederick Kellogg, Esq., of New York.

The officers chosen for the ensuing year are: President, Alfred F. Skinner; vice presidents—Harvey F. Carr, Camden; Chauncey G. Parker, Newark; Maximilian T. Rosenberg, Jersey City; treasurer, Lewis Starr, Camden; secretary, LeRoy W. Loder, Bridgeton.

NEW YORK

The New York State Bar Association, of which Nathan L. Miller, of Syracuse, is president, and Frederick E. Wadhams, of Albany, who is also the treasurer of the American Bar Association, is secretary, was incorporated in 1877. During the forty-three years of its existence it has occupied a prominent place among the State Bar Associations, in the advancement of the science of jurisprudence, the promotion of law reforms and in facilitating the administration of justice.

Notable among its many activities are the persistent efforts of the Association in the important matters of a consolidation of the general statutes of the state and in the simplification of the civil practice procedure.

The rapid increase in population and in industrial activities had required, from time to time, revisions in the general statutes of the state; but, with the exception of the Revised Statutes of 1829, these revisions had been, to a considerable extent, superficial and in response to insistent demands for changes in specific particulars. A re-statement and a complete consolidation of the general statutes had become imperative, and the Association advocated and promoted such a consolidation with the result that, in 1904, the board of statutory consoli-

dation was established by an act of the legislature. The work of this board resulted, in 1909, in the enactment of the Consolidated Laws.

Another subject of leading importance that early received the practical attention of the Association was the simplification of the civil practice procedure. Following the adoption of a new state constitution, the Code of Procedure was enacted in 1848, and continued in effect until the adoption of the "Code of Remedial Justice" in 1876. The last named code was succeeded in 1877 by the Code of Civil Procedure, which is the general court practice of the state at the present time. This Code, by reason of changes and amendments made to meet the requirements which progress demanded, became perplexingly voluminous and, in many instances, uncertain through the frequent inclusion in the subject matter of the saving clause, "except as herein otherwise provided." This Code also included among its provisions much substantive law which was out of place in a "practice act."

Coincident with its organization, the Association took up the matter of the improvement of the codified practice provisions, and its persistent efforts along the line of betterment in the statutory provisions relating to the civil practice resulted in the enactment by the legislature of 1913 of an act to simplify the civil practice, by which the board of statutory consolidation, of which Hon. Adolph J. Rodenbeck, formerly a judge of the court of claims and later to become one of the justices of the Supreme Court, was chairman, was directed to prepare and to present to the legislature a practice act, rules of court and short forms, as recommended by the board of statutory consolidation in its report to the legislature.

In the following year Judge Rodenbeck, to whose special attention the matter had been delegated by the board, reported to the board of statutory consolidation suggestions for a proposed act for the simplification of the civil practice, and a tentative draft of proposed rules of court relating to "General Provisions" and "Interlocutory Provisions," and also a proposed "Rights and Limitations Law."

In 1915 the board of statutory consolidation presented its report to the legislature in which a "Short Practice Act," "Rules of Court" and "Special Practice" were submitted.

This report was referred to a joint committee of the legislature, and in 1918 the committee on revision of civil practice of the State Bar Association reported to the Association that the report of the board of statutory consolidation having been before the legislative committee for three years, during which time various amendments had been made to the Code of Civil Procedure, the board had prepared and would submit to the legislature a report bringing its practice act, court rules and substantive statutes down to January, 1918.

The joint committee of the legislature, in the main, disregarded the plan presented by the board of statutory consolidation, and submitted its report, in the form of a General Practice Act, to the legislature of 1920, which passed the bill as reported.

Following the passage of the bill, the Association, by resolution, advised the governor that his approval of the act would tend to promote expedition and economy in the administration of justice in the state of New York, although such legislation did not go as far in the simplification of practice as the Association had theretofore urged and still favors. The resolution advocated further and continued efforts on the part of the Association to effect a practical simplification of the practice.

It seems highly probable that the work of the American Bar Association committee on the classification and restatement of the law, of which committee Judge Rodenbeck is the chairman, will furnish material and suggestions that will aid the State Bar Association in the eventual attainment of a practical simplification of the civil practice in the courts of the state.

NORTH DAKOTA

The annual meeting of the Bar Association of North Dakota was held at Jamestown on August 19 and 20. Interesting features of the program were: annual address by Hon. Peter W. Meldrim of Savannah, Ga. on "The Trial of Aaron Burr;" a paper by the Right Hon. William Renwick Riddell, Justice of the Supreme Court of Ontario, entitled "What of Canada?"; and the consideration of a plan to organize the Bar of the state as a self-governing body, by appropriate legislation.

OHIO

Secretary J. L. W. Henney thus summarizes the main actions taken by the State Association for the past year:

Adopted a resolution, also recommended by the American Bar Association, relating to "conflict of law for removal of causes from State courts to Federal court;"

Adopted a resolution, requesting the Judiciary Committee of the United States Senate immediately to report out and recommend for passage, S. B. 1214 authorizing the United States Supreme Court to adopt rules of practice and procedure in law cases;

Created a Judicial Section of the Ohio Association, as suggested by the American Bar Association, for the purpose of conference, discussion and interchange of ideas as to duties and responsibilities of the judiciary of Ohio, and for making recommendations to the Association;

Appointed a special committee of five to proceed with the project of incorporating the Ohio association, in so far as the Ohio laws would permit incorporation, or secure such legislation by the general assembly as would enable the same to be done;

Passed a resolution against the enactment of a uniform divorce law by Congress;

Amended the constitution of the association by prescribing that the president's address should be delivered at the meeting next after his election, instead of at the next annual meeting, thus enabling the association to ascertain the president's views before his incumbency is about to terminate, and providing greater opportunity for co-operation;

Amended the constitution of the association so as to permit the selection of a permanent secretary to reside at Columbus, Ohio, and devote his entire time to the duties of the office;

Appointed a committee to investigate and recommend needed changes in the Military Law.

Recommended the passage and assisted in se-

curing legislation increasing the compensation of Judges of courts of record;

Requested the Supreme Court of Ohio to direct its officer in charge of registration of persons seeking to qualify for admission to the bar examination to report the name of each applicant to the president of the local bar association, or to the presiding common pleas judge of such applicant's residence, for certification as to moral character before admitting applicant to examination; this certification to be in addition to the one required of applicant's preceptor;

Disapproved of the following propositions which were submitted, but not recommended, by the State Association committee on Judicial Administration and Legal Reform: (1) Legislation abolishing demurrers and providing that all matters heretofore presentable by them shall be incorporated in the answer or reply; (2) Legislation requiring motions to strike and motions to amplify to be filed one week in advance of time required for the pleading of facts; that motions to strike shall not take the place of answer or reply, nor operate to save a party from default; (3) Legislation doubling the term of judges of the Supreme Court and Court of Appeals, and a Constitutional Amendment doubling the term of Common Pleas Judges: (4) Constitutional amendment providing that all judges of the Common Pleas Court, Court of Appeals and Supreme Court shall be appointed by the Chief Justice of the Supreme Court, who, alone, shall be elected; (5) Legislation making perjury contempt of court and providing for immediate trial, upon charges preferred at once by the trial judge before another judge and a jury.

Sir James Aikins, K. C. of Winnipeg, Canada, President of the Canadian Bar Association and Governor of Manitoba, delivered the principal address at the Mid-Summer meeting of the Ohio State Bar Association, held at Hotel Breakers, Cedar Point, Ohio, on July 6, 7 and 8. Sir James, long an active practitioner and one of the foremost lawyers of Canada, captivated his auditors with his brilliant oratory and scintillating wit. He took for his subject "The Great Hope," and pleaded for the unity of the English speaking nations, besides technically discussing Canada's constitutional government under the British North America Act. Governor James M. Cox of Ohio gave a most cordial greeting to the Chief Executive of the Great Canadian Prairie State. Sir James was elected an honorary member of the Association, sharing that honor with John H. Patterson, manufacturer and philanthropist of Dayton, Ohio, who enjoys the unique distinction of having been elected an honorary member although not of the legal profession. The honor was conferred upon Mr. Patterson at the Mid-winter meeting in January of this year in recognition of his long and distinguished efforts for public welfare. Mr. Patterson also addressed the Association, on "Industrial Democracy."

Daniel W. Iddings of Dayton, Ohio, was unanimously elected President of the Association for the ensuing year. Mr. Iddings is the member from Ohio of the General Council of the American Bar Association. The new President plans a vigorous campaign for the betterment of the Association, including the employment of a paid Executive Secretary.

There was a strong sentiment among those in attendance for the incorporation of the Ohio Association under the uniform state bar incorporation plan of the American Bar Association.

PENNSYLVANIA

The twenty-sixth annual meeting of the State Association was held at Bedford Springs, Pa., June 22-23-24. Edward J. Fox, of Northampton, President, delivered his annual address. Among the papers read was one by Charles H. English on "The Article on Municipalities in the Proposed Redraft of the State Constitution."

The committee on Criminal Law recommended a statutory amendment increasing the period of limitation for indictment and prosecution of bigamy, false pretense or fraudulent conversion from two to five years. It favored a system of indeterminate sentence, probation and parole for federal prisoners. It also urged legislation abolishing county jails and establishing state farms where every inmate will be employed; providing for compensation of prisoners for work done; providing that the products of this labor may be sold to the various state departments and state institutions receiving state aid, and that the various state subdivisions may also purchase same. It further recommended an amendment to the Constitution permitting the creation of a Board of Pardon, Parole and Control to supervise the entire penal system of the state.

The following officers were elected for this year: Paul H. Gaither, Esq., Greensburg, President; Frank C. McGirr, Pittsburgh; H. S. Dumbald, Uniontown; Hon. N. Sargent Ross, York; Hon. Alonzo T. Searle, Honesdale; Hon. J. Butler Woodward, Wilkes Barre, Vice-Presidents; Harold B. Beitler, Esq., Philadelphia, Secretary; Samuel E. Basehore, Esq., Mechanicsburg, Treasurer.

SOUTH CAROLINA

The Annual Meeting of the South Carolina Bar Association, held in Columbia, S. C., on April 23 and 24, was well attended. The principal address was made by Hon. William H. King, United States Senator from Utah. The following officers were elected: President, William D. Melton, Columbia; Secretary, C. S. Monteith, Columbia; Treasurer, Alfred Wallace, Columbia. The Executive Committee will fix the time and place for the next meeting.

VERMONT

Guy W. Hill, secretary of the State Association, has presented his resignation. Professional engagements and physical condition, due to a recent injury, are assigned as the cause.

WISCONSIN

The next meeting of the State Bar Association will be held at Milwaukee Sept. 28-29-30. Hon. Albert J. Beveridge and Hon. Paul S. Reinsch will be the principal speakers. There is also to be an important discussion of the question of the practice of law by trust companies, according to Secretary George E. Morton.

John Bradley Winslow, Chief Justice of the Supreme Court of Wisconsin, died at Madison, Wisconsin, on the 13th of July after an illness of several months. Judge Winslow was born October 4th, 1851, at Nunda, New York. He graduated

from Racine College in 1871 and from the Law School of the University of Wisconsin in 1875. He practiced law at Racine, Wisconsin, until 1883, when he was elected Circuit Judge of the First Judicial Circuit. He occupied that position until May 4th, 1891, when he was appointed a Justice of the Supreme Court of Wisconsin. He became Chief Justice of that court, December 30th, 1907, because of seniority of service and continued as Chief Justice until his death.

Justice Winslow was especially interested in the work of bar associations and for many years attended the meetings of the Wisconsin State Bar Association and most of the meetings of the American Bar Association. He was President of the Wisconsin State Bar Association in 1918. He addressed the Judicial Section of the American Bar Association in 1914 and the Section of Legal Education in 1919. He was President of the American Institute of Criminal Law and Criminology in 1911-12. He had been for several years lecturer on Legal Ethics at the University of Wisconsin Law School. He published a three volume work of Forms of Pleading and Practice under the Code and was the author of a history of the Supreme Court of Wisconsin.

Justice Winslow's long judicial career had brought him to the foremost place among American jurists. His opinions were based not only upon a clear knowledge of the common and statute law but upon a strong common sense and a deep instinct for justice. He was much interested in the simplification of procedure and did much to improve the practice in Wisconsin both through his decisions and by his advocacy of this reform. He had a fine literary style which enlivened his opinions and which made him in great demand as a public speaker. During the war he gave freely of his time and strength both as a speaker and an executive to the furtherance of America's cause. In recognition of his services in this work he was made by the King of the Belgians a Commander of the Order of the Crown.

Justice Winslow was in a very true sense a leader of the bar of the state. His great interest not only in legal affairs but in all the lawyers of the state endeared him to the bench and bar. A concrete illustration of the esteem and affection in which he was held was the recent presentation to him of a purse of over $15,000. as the voluntary gift of the lawyers of Wisconsin.

JUDGE CARROLL T. BOND

As Chairman of the Committee on Publications His Work for the Association Has Been Extremely Valuable

JUDGE Carroll T. Bond was born in Baltimore City, Maryland, on June 13, 1873. His father, the late James Bond, was for many years Clerk of the Superior Court of Baltimore City and later President of the American Bonding Company. Judge Bond's early education was obtained in the public and private schools of Baltimore but he prepared for college at Phillip's Exeter Academy, Exeter, New Hampshire. He entered Harvard in the fall of 1890 and graduated in the class of 1894, with a degree of A. B. The fall after his graduation he entered the law office of Colonel Charles Marshall, who at that time was senior member of Marshall, Marbury & Bowdoin. Colonel Marshall was one of the leaders of the Baltimore Bar and one of the ablest trial lawyers of his time. He is also distinguished as having been the Chief of Staff of General Robert E. Lee. While in the office of Colonel Marshall, Judge Bond took the law course at the University of Maryland, graduating with the class of 1896 and was admitted to the Baltimore Bar on June 1, 1896. He continued his association with the office of Marshall, Marbury & Bowdoin, and subsequently became a member of the firm of Marbury & Gosnell.

While a member of the Bar, Judge Bond devoted his time to the trial of cases as well as office work, and was regarded not only as a very sound, well informed lawyer, but also as a good trial lawyer. The Maryland Reports show not only that he argued more than the ordinary number of cases in the appellate court, but also that his briefs displayed soundness, thoroughness and thoughtfulness.

On April 13, 1911, he was appointed by the late Governor Crothers a member of the Supreme Bench of Baltimore City, filling the vacancy caused by the resignation of the Hon. Henry Stockbridge, who was appointed one of the associate judges of the Court of Appeals of Maryland. In the following November Judge Bond was elected for the position which he is filling by appointment by a substantial majority for the term of fifteen years.

It might be well said that Judge Bond was more interested, even while a practicing lawyer in the law as a science, and this characteristic has done much to give him the position on the Bench which he now holds in the regard entertained for him by the members of the Bar, for he never decides a case on what are sometimes called general principles but which too often are simply an inaccurate idea of fundamental principles. In other words, he is always careful to examine the books and satisfy himself first as to what principles of law are applicable to cases like the one under consideration and then, having established accurately what those principles are, to apply them to the case. It is not to be understood that he is a "case lawyer" or that he overlooks for one instant what justice requires in the particular case, but he conscientiously avoids parting from well settled principles in order to work out the result which he thinks is desirable.

During the last few years he has been much interested in the proposition to consolidate the local courts of Baltimore City into one Court for the purpose of conserving time to those interested in litigation, expediting the work of the courts and reducing the costs of the administration of justice by eliminating the clerks' offices for each court and he has carefully studied the judicial systems of other large cities.

Judge Bond has rendered great service to his community and his ability, fairness and fearlessness have won for him a high place in the esteem of the members of the Bar and of the people generally.

Judge Bond has for some years been an active and useful member of the Association. For five years he has been Chairman of the Committee on Publications. In this capacity he has rendered most efficient and valuable service in editing the material for the Journal of the Association and, to some extent, the annual reports, always with much tact and marked discrimination.

CREATING A WORLD COURT

—Photo by Courtesy of the Chicago Tribune.

Advisory Committee for the Permanent International Court of Justice in conference in the Carnegie Peace Palace in The Hague. Elihu Root, the American member, and James Brown Scott, his colleague, are seated in the right foreground with M. Adatci of Japan in front of them. The first man to the left of the Japanese member is Lord Phillimore of Great Britain, and behind him in order are: Dr. Loder of Holland, Baron Descamps of Belgium, chairman of the committee, Dr. Hagerup of Norway, Raphael Altamira of Spain, Ricci Bussati of Italy, and M. de la Pradelle of France. The committee was invited by the council of the League of Nations to formulate plans for the creation of a world court.

CREATING A WORLD COURT OF JUSTICE

Tentative Draft for International Tribunal—Trouble Over "Equality of States"—Limitation of Powers

UNDER Article 14 of the Covenant of the League of Nations, it was provided that the Council of the League should formulate and submit for adoption by the members "plans for the establishment of a Permanent .Court of International Justice" which "shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it," and may also give an "advisory opinion" upon any dispute or question referred to it by the Council or the Assembly of the League. The draft of a statute bringing such a Court into existence, and determining the manner of its organization and procedure and the scope of its jurisdiction, is now in existence. It is the work of the Commission of international lawyers which, on the invitation of the Council, met at The Hague on June 13, and which ended its labours on July 23. The draft statute will be submitted to the Council at its meeting at San Sebastian on July 30, and later to the Assembly of the League, which gathers at Geneva on November 15.

Five weeks of discussion by jurists chosen from the United States, Great Britain, France, Italy, Japan, Belgium, Spain, Holland, Norway, and Brazil have resulted in the formulation of something which—its authors believe—will endure. Difficulties which were found well nigh insuperable at The Hague Conference of 1907 have been adroitly surmounted and a scheme for a Court of Justice, as distinct from a Court of Arbitration, has emerged. The development of a body of jurisprudence, at once continuous and progressive, making inevitably for the harmonious development of international law against the background of tradition, is not the least—if, indeed, it be not the chief—of the advantages claimed for this plan over the method of arbitration, hitherto occasionally resorted to. Its authors, however, have not sought to supplant the permanent Court of Arbitration at The Hague, which may, and doubtless will, continue independently to perform parallel and similar functions.

It is proposed that the Permanent Court of International Justice shall have 15 members — 11 titular and four substitute Judges — though the Council in its discretion may eventually move, and the Assembly sanction, the increase of this number to 21 (15 titular and six substitute). Decision on this question was not reached without difficulty. The Great Powers demanded to have each a Judge among the number constituting the Court, whose decisions, they did not fail to point out, needed the implicit authority of their economic, financial, and military strength. The smaller Powers, arguing that a Court in the choice of whose Judges they conceivably might not have participated, would not inspire the necessary confidence, called in aid the doctrine of the equality of States. Some means of assuring to each of the Great Powers the representation they sought, and of winning the adhesion of the lesser Powers, was necessary, and the appeasing compromise was found in an agreement that Judges should be elected, and in the manner prescribed for that election.

It is provided that the representatives on The Hague Court of Arbitration of the 32 original members of the League, and of Powers subsequently adhering, shall draw up a list of persons eligible—not more than two for each Power or group of Powers — calling in the assistance of the High Courts of Justice, Faculties and Schools of Law, or other accredited legal bodies of each country. This list, which will contain from 50 to 100 names, will be submitted to the Council and the Assembly of the League, which will proceed independently to the election, first of the titular, and secondly of the substitute, Judges. It is here sought to assure that the voting preponderance of the Great Powers on the Council, and of the smaller Powers in the Assembly, shall be mutually corrective, to the satisfaction of both. An absolute majority of votes, in Council and Assembly, is necessary to election, though if two candidates of the same nationality are chosen only the older will be allowed to stand. Three ballots are allowed, and if after the taking of the third there should still remain seats to be filled a Joint Committee of Council and Assembly —three members from each—is charged with this duty. This Joint Committee is allowed, in making a choice, to go outside the list of names supplied by The Hague Court of Arbitration. Finally, if even the Joint Committee fails to make up the Court to the required number, those Judges already elected are empowered to choose, a casting vote being given to the oldest among them.

Second in order among the difficulties which the Commission faced and overcame was that involved in the presence on the Bench of a Judge of the nationality of one of the parties to the dispute. This was discussed at great length, and it was finally agreed that in such a case the second party should have the right to name a Judge, preferably of its own nationality, but if this were found impossible, to make another selection, preferably among those whose names had been originally submitted by The Hague Court of Arbitration. Similarly, if neither party is represented nationally on the Bench, each may name a Judge to sit for the case in dispute. If several parties make common cause, they will count as one in the matter of representation on the Bench, and must by agreement among themselves name their Judge.

On the all-important question of the jurisdiction of the Court, much time was spent. It was agreed that cognizance should be taken only of disputes as between State and State, and that the Court should be available to the original members of the League and to those subsequently adhering. A problem of much delicacy arose, however, when the right of access to the Court of States not members of the League was discussed. What should be the position, for instance, on the one hand, of the United States—a signatory to the Pact, but not yet a member— and, on the other hand, of Germany? It was agreed that for the latter, as for the former, the Court should be open, but it was left to the League of Nations to distinguish between one and the other in the treatment accorded them. Thus, the United

States, in the event of that country having recourse to the Court, would have full rights—including the power to name a Judge—on condition of contributing to general expenses. For Germany, however, or other Powers situated as is Germany, the right to name a Judge might be withheld.

The scope of the Court's jurisdiction next arose. It was easy to agree that questions, of whatever nature, as between States might be submitted to the Court by agreement between the parties concerned. The assigning of limits within which all members of the League of Nations should bind themselves to carry their differences to this tribunal was, however, more difficult. A suggestion that all "justiciable questions" between members must be taken to the Court was met by a demand that a rigid definition of "justiciable questions" should be made. Finally, appeal to the Court was made binding on members of the League for disputes as to:—

(1) Interpretations of treaties.
(2) Questions of international law.
(3) Questions of fact which, if the fact were proven, would constitute a violation of international law.
(4) Questions of redress, or of reparation due for a violation of international law.

These are the salient features of the draft statute. They give a sufficient indication of the way in which the principal difficulties have been overcome, and of the advance which a Court so constituted would represent on international tribunals previously created. Minor questions of organization—the Judges' tenure of office, scale of pay, and so on—and the whole scheme of the procedure of the Court, are of less importance. The Commission, whose work ended when this draft was made, are hopeful that the proposals it embodies on the vital points indicated in this article will be accepted by the League. All else would then be relatively simple, and a notable contribution to the cause of world peace would, they believe, have been made. They have worked, as M. Leon Bourgeois said in a telegram of good wishes received as they rose from their labors "in the interests of the whole world, of law, and of justice."

OUR ANNUAL MEETINGS

THOSE of our members who habitually attend our meetings must certainly appreciate their value and interest. For many members are found in attendance year after year when the president's gavel falls and his call to order is heard.

It is not to those faithful ones that what we have to say is particularly addressed. In some churches the clergy makes moving appeals for increased attendance and sometimes caustic and severe criticism of those who do not come. But unfortunately these adjurations reach only those who do; and so their efficacy may well be doubted.

This Journal, however, goes to every member of the Association and we would like to say a word particularly to those who do not usually attend.

In the first place, the time when they are held, at the close of the summer season and the vacation period, should be convenient for lawyers. Moreover, it is usually when the country is most interesting and attractive; when the ripening grain has just been harvested; when the waving cornfields, with their verdent sheen, give an appearance of freshness in their contrast to the yellow stubble; when hill and mountain, valley and river and the mighty seas that wash our shores, the great plains and prairies, the cotton fields, the mines, all suggest the wonderful productive power of our great country, its limitless resources, and that, as the fall and the winter come on, we shall not be unprovided for.

To travel over this favored land at such a season is a wonderful experience.

So we meet in all parts of it. In 1907 at beautiful Portland on Casco Bay, that wonderful New England shore; in 1908 at the Metropolis of the Pacific Northwest on Puget Sound, that tremendous natural harbor; in 1910 at Chattanooga on storied and historic grounds; at Salt Lake City in 1915; at the western Metropolis in 1916; at old Boston, rich in historic association and all the resources of modern culture, in 1919; and this year in beautiful St. Louis, the acknowledged Queen of the Mississippi Valley, with its traditions of Gallic grace and culture, of genuine hospitality and cordiality, both southern and western, its great natural beauty, and its able Bar from whom our first president, James O. Brodhead, was chosen, and which has furnished others as worthy successors.

Then at these meetings we see and meet men from all over the country. It tends to make us less provincial and parochial, to broaden our horizon and help us to think and feel in terms of the whole country. Take the wonderful list, aside from our officers and committee chairman, of some of those in attendance and participating in our great Boston meeting last year:

David Jayne Hill, former Ambassador to Germany, a distinguished diplomat and international lawyer; Robert Lansing, then Secretary of State; Elbert H. Gary, a great captain of industry graduated from the Bar; and those two commanding figures in Jurisprudence, Viscount Finlay, former Lord Chancellor and also Attorney General of Great Britain, and Edward Douglas White, Chief Justice of the United States—to say nothing of our favorite sons Elihu Root and Charles E. Hughes.

Then there were numerous and spirited discussions of committee reports participated in generally by those present. All this tends to nationalize our Bar, to promote a proper professional spirit and to encourage friendship and cordiality between lawyers all over the country. If those who do not come regularly will make a little sacrifice, if necessary, attend two or three meetings in succession and make the acquaintance which will naturally follow, we are sure they will feel well repaid for their effort.

JUDICIAL PRECAUTION

A prisoner was tried before Chief Baron O'Grady at Wexford on an indictment for highway robbery, and, although the evidence amounted to a strong probability of his guilt, the verdict was an acquittal. Richard Newton Bennett, who defended the prisoner, immediately applied to the Chief Baron for an order for his liberation, to which the other replied: "He will be discharged from custody, Mr. Bennett, tomorrow at noon. I shall set out for Waterford in the morning, and I wish to have a couple of hours start of your client."

"BUSINESS METHODS IN A LAWYER'S OFFICE"

From an Address Delivered by Wilmer T. Fox, Jeffersonville, Indiana, Before the Indiana State Bar Association

THAT the lawyers of the country, those of small as well as large practice, can profit by the introduction of modern efficiency and accounting methods in their offices is the argument of an address by Mr. Wilmer T. Fox of Jeffersonville, Ind., before the Indiana State Bar Association. He declares that the problem of collecting and making available to the profession the relative merits of "all these hidden short cuts and efficiency methods" is one "large enough for the American Bar Association, though not necessarily too large for this Association."

Co-operative effort by and through such organizations is suggested as the best solution of that problem. "Organizations in the mercantile world," the address says, "no larger than our own have employed experts in their particular lines and compiled and disbursed for the common good information that no individual alone could have acquired, and if the writer does not mistake the trend of the times, our own profession must soon take similar co-operative measures."

Taking the matter of office equipment and filing devices as a simple illustration of the value of this co-operation, the address says that "Every lawyer has no doubt purchased and then discarded perfectly good equipment that was unsuited to his requirements. Had he been able to refer to the report of an expert, employed by this or the American Bar Association, explaining the equipment best suited to various types of law offices, he could have avoided many mistakes. In the matter of accounting and labor saving forms, the report of an expert in such matters would be of even greater value."

DAILY RECORD — DATE Jul 1, 1920

HOURS	NATURE OF SERVICE	CHARGE TO	Total Hours
8:45			
9:00	Opened mail	Routine	½
9:15			
9:30	Court room—filed demurrer		
9:45	in Jones vs Smith #10873	Smith	¾
10:00			
10:15	Misc. Dictation	Dic.	½
10:30			
10:45	A. S. Remy, R.F.D. #3		
11:00	Borden Cons. about line fence and advice	Remy	½ Pd. $5
11:15	Preparation of brief on		
11:30	Nat'l Surety Co. vs Clark	Nat'l	1
11:45	Co. appeal		
12:00			
12:15	A. S. Remy—authorized		
12:30	suit made memo. of witness, etc.	Remy	½
P. M.			
1:00			
1:15			
1:30			
1:45	Collected 3 Claims	Collec.	½
2:00	A. B. Jones—ordered		
2:15	deed, mtge. and 5 notes		1¼
2:30	Searched records to		
2:45	verify description		
3:00			
3:15	R. T. Davis—tel. re lease	Davis	¼t. 75c
3:30			
3:45	Checked bank balance	Routine	½
4:00			
4:15	Carnegie Library—Direc-		
4:30	tors meeting	Civic	1
4:45			
5:00	Signed correspondence	Routine	¼
5:15	Checked A. B. Jones deed,		
5:30	mtge. notes—mailed same to him	Jones	½

FAC-SIMILE OF A DAILY CHARGE RECORD SHEET

"In a general way," Mr. Fox asserts, "office equipment and systems should serve three distinct purposes. First, the performance of the task in hand in the quickest time and with the least effort upon the part of the lawyer and his clerk. Second, the keeping of adequate records of all work performed, so that no loss may result by reason of failure to bill for services rendered. And last, the keeping of the bookkeeping records by a system that will give the lawyer an adequate idea of his overhead expenses, so that his charges may be so adjusted as to provide an adequate return for his labor and skill, after deducting all apparent costs and some that ordinarily are not considered as expenses of doing business."

Performance of tasks with the least expenditure of energy means, of course, the installation of modern labor-saving devices. The typewriter is mentioned as the most common of these, while the dictating machine is particularly recommended. But good equipment alone, we are assured is not

sufficient without a well planned system. All routine work and all possible minor tasks should be delegated to the stenographer. The lawyer's time is too valuable to be taken up with such matters. The use of standardized forms in this connection is of great value, especially if the lawyer has a specialized practice. In such offices the most convenient system is the preparation of standard paragraphs for letters, grouped under various subjects, which paragraphs are numbered and transcribed by the typist without the necessity of dictation or reference other than to the form number.

"A great saving in time and improvement in accuracy can be made in drafting deeds, mortgages, standard contracts and the more common forms of court proceedings and orders by the use of standard forms," it is stated. The author cites his own experience by way of illustration. In case of a deed, for instance, he has a standard form with the blank spaces for the name of the grantors, county, name of the grantees and other variable essential elements numbered consecutively. In drafting the deed it is only necessary to dictate the information called for by each numbered blank. In the case of mortgages and many contracts, separate paragraphs are drafted covering every common situation and by assigning each paragraph a number it may be included or omitted by a mere reference to that number.

"Planning of the office work is necessary if it is to be done on schedule and with a minimum of effort," the address continues.

"This requires a record of engagements and matters requiring attention in the future. The use of a calendar pad or a diary is satisfactory, but those who have made the matter a study recommend the replacement of these by a small card index file provided with guides for the days of the month and for each month of the year. Slips of paper, on which are jotted down memorandums, automatically come to the attention on the day on which they require action. The advantage of the card index system over calendar pads and diaries is that matters postponed may be re-assigned a new date without the necessity of re-writing the item, the slip being merely taken out and placed at the later date. Whether justly so or not, lawyers are frequently accused of lack of system in this particular.

"The filing of documents and correspondence is one of the most exasperating tasks that confronts the lawyer. There are many good filing systems, but all sooner or later break down in some particular. If every paper is permanently filed, the office soon becomes congested with transfer cases. For some time the writer has used a system with a reasonable measure of success, whereby correspondence is filed in three distinct sets of vertical files, all alphabetically arranged. All live matters are placed in a vertical file labelled 'Pending Correspondence.' As soon as a matter is closed, the file is inspected as to the advisability of keeping all, or part of it, in a permanent file. If the matter is of a trivial nature, it is transfered to a vertical file labelled 'Closed—Unimportant.' At the beginning of 1920, all 1918 correspondence in this file was destroyed, on the theory that any developments requiring its use would have transpired within the year 1919. All matters of importance are transferred from 'Pending Correspondence' to the permanent file of closed matters and, when the file overflows, are removed to transfer cases. In the case of collections, the copy of the letter closing the transaction is placed in the permanent closed file and the remaining papers are preserved for one year in the 'Closed—Unimportant' file. As a complete bookkeeping record is kept of all money transactions, a reasonably sufficient record remains."

The importance of keeping an accurate record of all work done throughout the day is asserted and enlarged on. "Theoretically, a record should be kept of every minute in the day," the address says, "practically, only the more important matters can be preserved. In large offices employing a bookkeeper, each member of the firm should be provided with a pad of printed blanks, on which he will note down the day and hour and time consumed on each item to which he devotes his attention and to whom the services are to be charged. These slips will be assorted, posted and filed by the bookkeeper. Such a system is too cumbersome for the small office. A much better record is made by having blanks printed and padded, about six by nine inches, with a column in which the working hours of the day are divided into fifteen minute intervals, followed by columns for the nature of the services rendered, to whom charged and the time consumed. A complete record is thus available and proper charges can be made. In cases where clients question the reasonableness of the fee, such a record of the work done is invaluable. * * * From its use many small services will be billed and collected that would otherwise have been forgotten."

The address particularly recommends an accurate record of income and expenses, declaring that if modern methods are used, this need not be a burden. After suggesting a fairly simple system, it continues:

"The fixing of fees upon an intelligent and demonstrable basis would relieve the lawyer of many disputes and misunderstandings. While it will never be possible to determine fees with the exactness prevailing in the sale of commodities, owing to the fact that consideration must be given to the experience and skill of the lawyer, to the amount involved, to the intricacy of the question presented for trial or determination, to the fact that the case was won, lost or compromised, and to innumerable special circumstances, yet the keeping of the records heretofore recommended and the application to them of the settled principles of cost accounting will go far towards removing from dispute many charges, especially as to small matters."

Proper cost accounting in a lawyer's office, according to the address, demands an accurate estimate of overhead expenses and, in particular, an understanding that these should include time devoted to routine work that cannot be assigned directly to any particular client. The principal elements in the "overhead" are, of course, rent, light, taxes, salaries, supplies and other office expense. But there is another item of the expense of running the business, and that is the return on the "capital investment." This item, it is suggested, is larger in the case of most lawyers than they expect. It is thus analyzed:

"On the expensive equipment of law books and office appliances, which depreciate rapidly and

which have little value except to a going concern, he should earn, without labor on his part, the customary interest return on the investment plus the annual depreciation in his principal by reason of use and obsolescence. Besides this tangible capital, the lawyer has invested the direct and indirect cost of his education, which is just as much invested capital as is that placed in the factory by the manufacturer. The direct cost of the education is the tuition charges, board, clothing, railway fares and expenses of books. The indirect cost should include the salary lost during the years in college (less the cost of board and clothing which has already been charged), and also the difference between the usual salary commanded by young men and that made by the lawyer during the early years of his practice, with interest on both direct and indirect cost to the time when the lawyer's income becomes sufficient to pay a return on his investment and pay him an adequate salary for each day's labor.

"In a rough and ready way lawyers have given consideration to all of these matters in fixing their fees, but no harm and much good can come from careful scrutiny and analysis of every item of expense and investment connected with the practice of our profession."

"DEAN OF THE ASSOCIATION"

NINETY-TWO years of age and still a practicing lawyer; sixty-seven years of practice in the courts, occupying the same office for the whole period; the oldest attorney in Pennsylvania in point of admission to the bar; member of the American Bar Association since 1889—such is the record of Samuel W. Dana of Newcastle, Pa. It apparently entitled him to be called the "dean of the Association." There are others whose membership antedates his—as, for instance, Samuel B. Adams of Savannah, Ga., who was elected in 1881. But no other member of his advanced age, it is said, is carried on the list.

Mr. Dana began the study of law in 1850 in Auburn, N. Y. Of those early student days he speaks entertainingly in a chapter of reminiscences in a volume entitled "Law and Letters," published by him in 1915. Just across the hallway was the office of Seward and Blatchford—the former then United States senator and afterward the "great secretary." Mr. Dana saw the original copy of the speech Mr. Seward delivered in the senate on the admission of California to the Union and was struck by the evidence of the labor, in the form of erasures and interlineations, by which the "natural and elegant style, the purity of the words and the easy flow of the periods" was achieved.

Another celebrity he recalled was Judge Conklin, father of Roscoe Conklin. One day the judge came into the room in which he and some other law students were sitting and found one of them examining an old-fashioned duelling pistol. "He took it from the young man," Mr. Dana added, "examined it carefully and expressed his great pleasure in knowing we were practicing marksmanship, an accomplishment every gentleman should have, and was much grieved that the accomplishment was becoming obsolete. If you had seen and heard him, you would look upon the duel not as a relic of barbarous times, but rather as an incident of a higher and better civilization."

After serving as principal of the Academy at Genoa, N. Y. from Sept. 1850 to March 1852 Mr. Dana entered as a student in the office of Johnson and Brown at Warren, Pa. In 1853 he was admitted on examination to the bar of Warren county. He moved immediately to Newcastle, Pa., entered the general practice and has remained there ever since. For sixty-seven years he has occupied the same office. In Oct. 1855 he was admitted to practice before the Supreme Court of the State. A letter dated May 22, 1920, states that he still goes to his office regularly and that only a few days before he had filed his report as a master in chancery in a divorce case.

Mr. Dana was born at Amherst, Mass., March 14, 1828, descending from Richard Dana, Cambridge, Mass., in the sixth generation. Fitted for college at Amherst Academy and graduated from Amherst College in the class of 1847. He has ever since retained the liveliest interest in his alma mater. In 1917 he was asked to send a special message to the Amherst College Alumni Association of Philadelphia. The essays in his book published in 1915 show him as a serene upholder of the tradition of liberal education for the lawyer. The lawyers under whom he studied in youth, as he recalls them, "were gentlemen of peculiar refinement, of kindly manners and possessed of great gentility." That the preliminary culture which makes such types possible is supremely important, in his opinion, is shown by his views on the proper education for one intending to enter the law. In an article on "Law and Letters," the first essay in the volume bearing that name, he says:

"For the long period before the boy puts on the toga virilis, and afterwards on to the time he registers as a law student and enters strenuously upon 'the law's grave study,' I insist that the principal means of his education and culture shall be, as they have heretofore been, the great works of ancient and modern literature. He cannot come within their manifold influences at too early an age. I earnestly urge the retention of what we have called the classical course for those having the profession of law in prospect."

PERSONALIA

Judge Thomas Z. Lee, of Providence, R. I., left New York on June 10, to attend a meeting of the Board of Directors of Le College des Etats Unis d'Amerique in Paris. While there he will also attend, on behalf of Boston University, meetings of the American University Union under a commission from President Murlin of Boston University. Later he will enter negotiations, in London, with the Royal College of Physicians, Royal College of Surgeons and the Examining Board of England to obtain their official recognition of Boston University's School of Medicine. Before returning to this country Judge Lee will prepare a report upon the present system of legal education in the Universities of Holland for Boston University.

"COLONEL'S LADY AND JULIA O'GRADY"

It is said that Mr. Justice Watkin Williams, when asked whether those whom he tried appeared to have any general characteristics, replied, "They are just like other people; in fact, I often think that but for different opportunities and other accidents the prisoner and I might very well be in one another's place."

LETTERS FROM MEMBERS

This department is designed as an open forum in which the members of the American Bar Association may express their opinions on matters of professional interest. It can and should be made one of the most significant and interesting in the Journal—a clearing house of timely and pertinent views.

Following are certain extracts from letters received by the board of editors from officials of the Association who were informed of the plan for the new Journal and whose assistance in getting out the present number was especially asked:

"I think the plan which has been adopted of making the American Bar Journal a monthly instead of a quarterly is an excellent one, and will much better sustain the interest in the Association than the less frequent issues."—W. A. Blount, Pensacola, Fla.

"A WISE CHANGE"

"I am much interested in the announcement and I think it is a wise change. A monthly publication of that character should be very popular and should result in largely extending the membership of the Association."—John E. Greene, Minot, N. D.

"GLAD TO CO-OPERATE"

"As the Ohio member of the General Council and President of the State Association, I shall be only too glad to co-operate with you and your associates in every way possible, and we will arrange to furnish you, through our secretary, monthly copy along the lines you indicate."—Daniel W. Iddings, Dayton, O.

POLICY "LOOKS GOOD"

"I think the whole membership of the American Bar Association feel the same way as I do when I say that I am deeply gratified to know that the American Bar Journal is to come under your editorial supervision. The outline of policy, set forth in your letter and circular, looks good to me."—Hugh Henry Brown, Tonopah, Nev.

"MUCH INTERESTED"

"I am very much interested in the effort to broaden the scope and widen the influence of the American Bar Journal and will do everything I can to aid that purpose."—T. J. O'Donnell, Denver, Colo.

WILL AID

"While my time is very much occupied, I will endeavor to do what I can to comply with your request, and trust the same disposition to help may be manifested by other members of the Association to the end that the Journal will be made interesting and instructive to all the members."—Henry L. Stone, Louisville, Ky.

FROM LOUISIANA

"I will do whatever I can along the lines suggested by you and believe that from time to time I will be able to contribute some matter that will be of interest to the readers of the Journal outside of those in Louisiana."—W. O. Hart, New Orleans, La.

CALLS IT A "GOOD WORK"

"It seems to me that the Journal can be made of exceptional benefit as well as interesting to the Bar, if proper co-operation with the managers can be enlisted of the Bar generally. I shall most certainly do anything in my power to aid the good work."—W. E. Sturtevant, St. Louis, Mo.

DANIEL W. IDDINGS,
President Ohio State Bar Association

MORE HELP

"I am sure that I speak for the members of the local council as well as myself when I say that I will gladly do all in my power to aid you to make the Journal a marked success."—G. Frederick Frost, Providence, R. I.

NEW LAW REVIEW

The Wisconsin Law Review, a quarterly, to be issued under the auspices of the Law School of the University of Wisconsin, will begin publication this fall. The magazine will be edited by a Board of Faculty Editors, of which Professor W. H. Page is editor-in-chief, and will also have a Board of Student Editors. It will be devoted chiefly but not exclusively to the legal problems of primary interest to the bench and bar of Wisconsin.

"A MOUTH FULL"

The late Marshall Strong, of Racine, a distinguished member of the Wisconsin bar, according to tradition thus once referred to his opponent's argument, "The learned counsel opens his mouth like a cellar window, not to let in the light, but to let out the darkness."

AMERICAN BAR ASSOCIATION

*Date*_____

A SUGGESTED FORM OF MEMBERSHIP PROPOSAL:

The constitution declares membership, in good standing at bar of any state during the last three years, a prerequisite to election.

NAME OF CANDIDATE Please Fill Names in Very Distinctly Typewriting Preferred	TITLE Hon. or Esq.	ADDRESS IN FULL Street or Building Should be Plainly Noted when Known.	YEAR AND PLACE ADMITTED TO BAR

Proposals should be promptly forwarded to the vice-president for the candidate's state, who will give the matter immediate attention.

I propose the above, who desire to become members of the association and who have been in good standing at the bar during the last three years.

*Signature of Proposer*_____

*Address of Proposer*_____

* Members desiring to write friends who are members of the bar offering to propose them for membership, will find suggestions as to facts desirable to insert in such a letter at pp. 493-494 of the July, 1916, issue of the AMERICAN BAR ASSOCIATION JOURNAL.

It is not necessary that candidates should sign any application papers or pay any dues in advance of being notified of election by the Membership Committee.

Proposal blanks will be promptly furnished on application to the *Membership Committee*, Lucien Hugh Alexander, Chairman, 3400 Chestnut Street, Philadelphia.

Members when forwarding a membership proposal to a Vice-President will please at the same time have a carbon impression made of the typewritten portion of the proposal, either on a plain sheet or on a duplicate blank, and at once transmit it to the *Membership Committee* at above address. It is not essential that there be a letter of transmittal with a proposal; but should one be sent it is requested, in order that a duplicate record may be on file that a carbon copy of the letter to the Vice-President be at the same time forwarded to the *Membership Committee*.

The Editors will appreciate the courtesy if comment on this, the first monthly issue of the Journal of the American Bar Association, be mailed to 1612 First National Bank Building, Chicago.